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The Role of Personal Mitigating Factors in Criminal Sentencing Judgments: An Empirical Investigation

A thesis submitted to Middlesex University
in partial fulfilment of the requirements for the degree of
Doctor of Philosophy

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Abstract
The Role of Personal Mitigating Factors in
Criminal Sentencing Judgments: An Empirical Investigation

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Criminal sentencers must weight and integrate many different factors to reach a judgment, including aggravating factors that argue for a harsher sentence, and mitigating factors that suggest a more lenient sentence. Personal Mitigating Factors (PMFs) relate to the offender, rather than the offence (e.g., remorse or youth/immaturity). Research shows that discretionary sentencing produces inconsistency and bias and lacks the transparency needed to maintain public trust in justice. Although many jurisdictions have introduced more structured sentencing, the mitigation process remains largely discretionary. Structuring personal mitigation could help produce fairer sentences. Any structured approach must, however, be informed by empirical data, and little is known about how sentencers use PMFs, or how the public judges them. This thesis examined the role of three commonly occurring PMFs: remorse, good character, and addressing addiction.

Study 1 examined sentencers' use of PMFs in cases of assault and burglary through a statistical analysis of annual sentencing data from the Crown Court in England and Wales. Study 2 used a qualitative analysis of interviews with a small sample of Crown Court judges to further explore the findings of Study 1 and identify topics for future research. Studies 3 and 4 used experimental designs to measure how the three PMFs influenced public judgments about sentencing fairness and choice of sentence length. Study 4's "idiographic" design permitted evaluation of the variation between individuals' judgments about PMFs.

The present thesis identified several issues with current sentencing practice, notably the underweighting of multiple co-occurring PMFs, and proposed some practical options for structuring the personal mitigation process. The thesis also identified conflicts between sentencers' use of PMFs and public judgments, and suggested how the gap between sentencers and the public could be closed. Lastly, the thesis illustrates how methodology from psychology can be used to advance our understanding of criminal sentencing.

Acknowledgements

*“The Road goes ever on and on,
Down from the door where it began.
Now far ahead the Road has gone,
And I must follow, if I can,
Pursuing it with eager feet,
Until it joins some larger way
Where many paths and errands meet.
And whither then? I cannot say.”*

J.R.R. Tolkien,
The Fellowship of the Ring

*“Everything will be all right in the end...
So if it’s not all right, then it is not yet the end.”*

Best Exotic Marigold Hotel

I am enormously grateful to my wife, my parents, my sister and her family, and the close friends who have been there for me during what has, at times, felt like a long and difficult road. I have learnt a huge amount about the meaning of love and support during that time – lessons I will never forget. Simply put: I could not have done it without you.

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Table of Contents

1. Literature Review	1
1.1. Judicial Discretion in Sentencing	2
1.1.1. Judicial Discretion Leads to Sentencing Disparity	2
1.1.1.1. Disparity based on extra-legal factors	4
1.1.1.2. Disparity based on inter-judge/court/district inconsistency	6
1.1.2. Psychological Explanations for Sentencing Disparity	9
1.1.2.1. Theories specific to sentencing	9
1.1.2.2. Limitations on human judgment that affect sentencing	11
1.1.3. Can Judicial Expertise Generate Skilled Discretion?	16
1.2. Personal Mitigation in Sentencing – A Discretionary Process	18
1.2.1. Character-based PMFs	19
1.2.2. The Current Status of PMFs in England and Wales	21
1.3. The Relevance of Public Opinion to Sentencing	27
1.4. Methods Used to Study Sentencing	31
1.4.1. Self-report Methods	31
1.4.2. Behavioural Methods	32
1.4.2.1. Statistical analysis of archival data	32
1.4.2.2. Experimental designs	34
1.5. Past Research on the Role of PMFs in Sentencing	38
1.5.1. Research on Sentencers’ Use of PMFs	38
1.5.2. Research on Character-based PMFs	45
1.5.2.1. Remorse	46
1.5.2.2. Addressing drug or alcohol addiction	47
1.5.2.3. Good character	48
1.5.3. Research on Public Judgments about PMFs	51
1.6. The Present Research	57
1.6.1. Research Aims and Objectives	57
1.6.2. Structure of This Thesis	59

2. Study 1: Personal mitigation in practice: An analysis of data from the Crown Court Sentencing Survey	60
2.1. Introduction	60
2.1.1. The Crown Court Sentencing Survey	61
2.1.2. Past Research on Mitigating Factors using CCSS Data	62
2.1.3. Focus of the Present Research	67
2.2. Aims and Objectives	70
2.3. Method	70
2.3.1. Design of the CCSS Datasets	70
2.3.1.1. Offences	72
2.3.1.2. Aggregating factors	72
2.3.1.3. Mitigating factors	75
2.3.1.4. Other legal factors	77
2.3.1.5. Extra-legal factors	77
2.3.2. Ethical Considerations	77
2.4. Analysis of the CCSS Data for Assault	78
2.5. Findings for Assault	78
2.5.1. Distribution of MFs and AFs	78
2.5.2. Associations Between MFs and AFs and Sentencing Outcomes	85
2.5.2.1. Presence of an MF, an AF, or both	86
2.5.2.2. Independent effects of individual MFs and AFs	89
2.5.2.3. Interactions between variables	95
2.6. Analysis of the CCSS Data for Burglary	99
2.7. Findings for Burglary	99
2.7.1. Distribution of MFs and AFs	99
2.7.2. Associations Between MFs and AFs and Sentencing Outcomes	105
2.7.2.1. Presence of an MF, an AF, or both	106
2.7.2.2. Independent effects of individual MFs and AFs	109
2.7.2.3. Interactions between variables	114
2.8. Comparison of Assault and Burglary Offences	116
2.9. Discussion	119
2.9.1. Implications	123
2.9.2. Proposals for Future Research	127

2.9.3. Strengths and Limitations	128
3. Study 2: Sentencers' perceptions of personal mitigating factors in sentencing	130
3.1. Introduction	130
3.1.1. Questions About PMF Use Raised or Unanswered by Study 1	131
3.1.2. Choice of Methodology	132
3.1.3. Past Research on Sentencers' Perceptions of PMFs	135
3.1.3.1. Remorse	135
3.1.3.2. Good character	135
3.1.3.3. Addressing addiction	136
3.1.3.4. Other findings	136
3.2. Aims and Objectives of the Present Study	139
3.3. Method	140
3.3.1. Participants	140
3.3.2. Design	140
3.3.3. Procedure	141
3.3.4. Ethical Considerations	141
3.4. Analysis	142
3.5. Findings	144
3.5.1. Judges' Interpretations of Character-based PMFs	144
3.5.1.1. Remorse	144
3.5.1.2. Good character	147
3.5.1.3. Addressing addiction	151
3.5.2. Judges' Perceptions of Interactions Between Character-based PMFs	153
3.5.2.1. Underweighting of multiple PMFs	154
3.5.3. Relationship Between Character-based PMFs and Sentence Type	156
3.5.3.1. PMFs and borderline cases	157
3.5.4. Does Offence Type Moderate the Effect of Character-based PMFs on Sentencing?	158
3.5.4.1. PMFs and offence seriousness	158
3.5.5. Other Topics Identified in the Data	161
3.5.5.1. Inconsistency of approach	161
3.5.5.2. Reluctance to accept guidance on personal mitigation	163

3.6. Discussion	165
3.6.1. Judges' Perceptions of Character-based PMFs	165
3.6.2. Implications for Understanding the CCSS Data	168
3.6.3. Potential Practical and Methodological Implications	170
3.6.4. Proposals for Future Research	172
3.6.5. Strengths and Limitations	174
4. Study 3: The effect of personal mitigating factors on public judgments of sentence fairness	179
4.1. Introduction	179
4.2. Aims and Objectives of the Present Study	184
4.2.1. Hypotheses	184
4.3. Method	186
4.3.1. Participants	186
4.3.2. Design	186
4.3.3. Stimuli	187
4.3.4. Measures	189
4.3.5. Procedure	189
4.3.6. Ethical Considerations	189
4.4. Results	190
4.4.1. Descriptive Statistics	190
4.4.2. Tests of Hypotheses	191
4.5. Discussion	198
4.5.1. Potential Implications	202
4.5.2. Proposals for Future Research	203
4.5.3. Strengths and Limitations	204
5. Study 4: The effect of personal mitigating factors on public judgments of sentence length	206
5.1. Introduction	206
5.2. Aims and Objectives of the Present Study	209
5.2.1. Hypotheses	210
5.3. Method	212

5.3.1. Participants	212
5.3.2. Design	213
5.3.3. Stimuli	214
5.3.4. Measures	215
5.3.5. Procedure	216
5.3.6. Ethical Considerations	217
5.4. Results	217
5.4.1. Descriptive Statistics	217
5.4.2. Tests of Hypotheses	218
5.4.2.1. Aggregated results	220
5.4.2.2. Regression results for individual participants	222
5.4.3. Interactions Between PMFs and Other PMFs/AFs	230
5.4.4. Relationships Between Demographic Variables and PMF Judgments	231
5.5. Discussion	232
5.5.1. Potential Implications	235
5.5.2. Proposals for Future Research	238
5.5.3. Strengths and Limitations	239
6. Further Analyses and General Discussion	241
6.1. Sentencers' Use of Character-based PMFs	242
6.2. Public Judgments about Character-based PMFs	244
6.3. Comparison of Sentencers' and Public Judgments about PMFs	248
6.4. Theoretical/methodological Implications: How Psychology Can Inform Research on PMFs	251
6.4.1. Psychological Explanations for the Present Research Findings	252
6.4.2. Methodological Innovations from Psychological Research	254
6.5. Practical Implications of the Present Research	259
6.5.1. Why Should Personal Mitigation be Structured?	259
6.5.2. How Could Personal Mitigation be Structured?	266
6.5.2.1. Option 1 – variable case weighting of PMFs	269
6.5.2.2. Option 2 – Fixed case weighting of PMFs	271
6.5.3. Conclusions on Structured Personal Mitigation	272
6.5.4. Challenges to Introducing Structured Personal Mitigation	273

6.6. Implications of the Findings on Public Sentencing Judgments	275
6.7. Proposals for Future Research	277
6.8. Concluding Remarks	279

References	282
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Appendices

1. Sentencing Council: Assault Definitive Guideline	322
2. Sentencing Council: Burglary Offences Definitive Guideline	323
3. Crown Court Sentencing Survey Forms for Assault and Burglary	324
4. Further details on Structure and Contents of the Crown Court Sentencing Survey Datasets	330
5. Study 1: Percentage of Assault and Burglary Cases (Table 1A.1 and 1A.2) Receiving Immediate Custody by Sentencing Factor in Crown Court Sentencing Survey Data Sets	332
6. Study 2: Question Script for Semi-structured Interview	336
7. Study 2: Further Details of Analysis Carried Out	337
8. Study 2: Table of Final Topics and Themes	341
9. Stimuli Used in Study 3	342
10. Study 4: Output of Orthogonal Design Function from IBM SPSS Statistics (Version 21)	353
11. Stimuli Used in Study 4	355
12. Study 4: Individual Multiple Linear Regression Models	364
13. Study 4: Interaction Terms in Individual Multiple Linear Regression Models	369
14. List of Ian K. Belton's Related/Relevant Publications and Presentations	371

List of Tables

Table 1.1	Aggravating and mitigating factors to be taken account of in a case of common assault. Taken from Sentencing Council (2011a), p. 25.	23
Table 1.2	Categories of aggravating and mitigating factor cited by sentencers in interview when describing sentenced cases that were on the cusp of custody	41
Table 2.1	Custody rates and average custodial sentence length associated with each mitigating factor occurring in more than 2% of cases of domestic burglary in England and Wales in 2013 and 2014	63
Table 2.2	Number of cases contained in the CCSS datasets, by offence category and year	71
Table 2.3	Percentage (and frequency) of AFs and MFs in assault cases sentenced in the Crown Court	79
Table 2.4	χ^2 and odds ratios for differing MF and AF combinations by specific assault offence	88
Table 2.5	Results from binary logistic regression of step two assault MFs and AFs predicting immediate custody	90
Table 2.6	Results from binary logistic regression to examine selected interactions between variables predicting immediate custody	96
Table 2.7	Frequency of occurrence of individual sentencing factors in burglary cases, arranged by category and % present in the dataset	100
Table 2.8	Results from binary logistic regression of step two burglary MFs and AFs predicting immediate custody	110
Table 2.9	Results from binary logistic regression to examine selected interactions between variables predicting immediate custody	114
Table 4.1	Means, standard errors and 95% confidence intervals for mitigating factor and sentencing type by fairness rating	191
Table 4.2	Means and standard deviations for PMF influence ratings (out of a possible 7)	195
Table 4.3	Rank order of PMF influence – statistically derived rank order versus self-reported rank order	197
Table 5.1	Summary of multiple linear regression analyses across 31 participants who had statistically significant regression models	221

Table 6.1	Character-based PMFs' ranked by their power in predicting non-custodial sentences in assault and burglary cases	243
Table 6.2	Character-based PMFs ranked by the size of their effects in Study 3 (burglary) and Study 4 (assault).	246

List of Figures

Figure 2.1	Flow diagram of steps one and two of the sentencing process required by the new (post-2011) England and Wales sentencing guidelines.	69
Figure 2.2	Frequency of assault cases involving one or more MF or AF. The grey bars represent cases where either no MFs or no AFs are present.	81
Figure 2.3	Number of assault cases involving different combinations of MFs and AFs, organised by MFs.	82
Figure 2.4	Venn diagram showing frequency of remorse, good character and addressing addiction across Crown Court assault cases. Circle sizes and positions are approximate only.	83
Figure 2.5	Co-occurrence of selected PMFs with other MFs in Crown Court assault cases.	84
Figure 2.6	Co-occurrence of selected PMFs with AFs in Crown Court assault cases.	84
Figure 2.7	Percentage of assault cases that receive an immediate custodial sentence when differing MF and/or AF combinations are present.	86
Figure 2.8	Percentage of cases with differing MF and/or AF combinations that receive an immediate custodial sentence, by specific assault offence.	87
Figure 2.9	Percentage of cases given immediate custody that are associated with each MF in the assault dataset, compared to the number of times <i>less</i> likely an offender is to receive immediate custody if each MF is present, based on the results of a binary logistic regression.	93
Figure 2.10	Percentage of cases given immediate custody that are associated with each AF in the assault dataset, compared to the number of times <i>more</i> likely an offender is to receive immediate custody if each AF is present, based on the results of a binary logistic regression.	94
Figure 2.11	Number of burglary cases involving one or more MFs or AFs. The grey bars represent cases where either no MFs or no AFs are present.	102
Figure 2.12	Number of burglary cases involving different combinations of MFs and AFs, organised by MFs.	103
Figure 2.13	Venn diagram showing frequency of remorse, good character and addressing addiction across Crown Court burglary cases. Circle sizes and positions are approximate only.	104

Figure 2.14	Co-occurrence of selected PMFs with other MFs in Crown Court burglary cases.	105
Figure 2.15	Co-occurrence of selected PMFs with AFs in Crown Court burglary cases.	105
Figure 2.16	Percentage of burglary cases with differing MF and/or AF combinations that receive an immediate custodial sentence.	107
Figure 2.17	Percentage of cases with differing MF and/or AF combinations that receive an immediate custodial sentence, by specific burglary offence.	108
Figure 2.18	Percentage of cases given immediate custody that are associated with each MF in the burglary dataset, compared to the number of times <i>less</i> likely an offender is to receive immediate custody if each MF is present, based on the results of a binary logistic regression.	112
Figure 2.19	Percentage of cases given immediate custody that are associated with each AF in the burglary dataset, compared to the number of times <i>less</i> likely an offender is to receive immediate custody if each AF is present, based on the results of a binary logistic regression.	113
Figure 2.20	Percentage of Crown Court cases involving each of remorse, good character and addressing addiction, by offence category.	117
Figure 2.21	Number of times <i>less</i> likely an offender is to receive immediate custody if remorse, good character or addressing addiction is present by offence type, based on the results of a binary logistic regression. Error bars represent 95% confidence intervals.	118
Figure 3.1	Diagram illustrating the two processes involved in PMFs' effect on a final sentence.	166
Figure 4.1	Mean fairness ratings by PMF.	192
Figure 4.2	Mean fairness ratings by PMF and sentence type: addressing drug/alcohol addiction versus none.	194
Figure 4.3	Mean fairness ratings by PMF and sentence type: good character versus none.	195
Figure 4.4	Mean fairness ratings by PMF and sentence type: assisting the prosecution versus none.	195
Figure 5.1	Mean custodial sentence length (months) by participant. Error bars	218

	are 95% confidence intervals.	
Figure 5.2	Mean b-weights by sentencing factor, aggregated across all participants with a significant regression model for the sentencing factors. Error bars are 95% confidence intervals.	221
Figure 5.3a	Distribution of b-weights for each PMF and AF for participants 4 to 23.	223
Figure 5.3b	Distribution of b-weights for each PMF and AF for participants 24 to 40.	224
Figure 5.4	Number of personal mitigating factors and aggravating factors included in participants' judgment policies.	225
Figure 5.5	Relative influence of AFs and MFs on custodial sentence length based on mean rank order from statistically-modelled judgment policies and self-reports. Error bars are 95% bias-corrected accelerated bootstrap confidence intervals.	229
Figure 6.1	Study 1 – Mean reduction in custodial sentence likelihood obtained from logistic regression models for Crown Court assault and burglary offences.	250
Figure 6.2	Study 2 – Effect sizes of each PMF on fairness judgments.	250
Figure 6.3	Study 4 – Mean regression coefficients for the weight given to each PMF in participants' regression models.	250
Figure 6.4	Flowchart representing the process for evaluating and integrating Personal Mitigating Factors (PMFs) and Aggravating Factors (AFs) at Step Two of the England and Wales sentencing guidelines.	268
Figure 6.5	Slide bars indicating case weights to be given to particular PMFs, for use in a structured sentencing system.	269

1. Literature Review

“Offenders are rarely so bad that nothing can be said on their behalf”

Wasik (1993), p. 62.

Criminal sentencing affects the lives of millions of people every year. In England and Wales alone in 2015, more than 1.2 million people were sentenced, of whom over 90,000 were sent to prison (Ministry of Justice, 2016)¹. The consequences of sentencing can be enormous for all those involved: not just the offenders, who may be deprived of their freedom, but also victims, their families and the wider public.

Any sentencing system must try to achieve several (often contradictory) goals. These are to punish offenders on the ground of just deserts and/or retribution, to reduce crime by deterring and/or rehabilitating offenders, to protect the public by incapacitating dangerous offenders, and to compensate or “heal” victims through reparation (e.g., Australian Law Reform Commission, 2006; Criminal Justice Act 2003, s. 142; Seghetti & Smith, 2007; United States Sentencing Commission, 2016).

Sentencing is also a complex and challenging cognitive task. Under pressure and within a limited timeframe, sentencers must attend to a large quantity of information including offence seriousness, legal constraints such as legislation, case law and/or sentencing guidelines, and various aggravating and mitigating factors. Aggravating factors are those that suggest an increased sentence, while mitigating factors point towards a reduced sentence. Sentencers must then weight and integrate all of the information in each case in a

¹ England and Wales are, together, a separate legal jurisdiction from both Scotland and Northern Ireland. The present research is focused on England and Wales only.

fair and unbiased way to reach a final sentence – a “cognitive balancing act” (Dhami, Belton, & Goodman-Delahunty, 2015).

1.1. Judicial Discretion in Sentencing

Sentencers traditionally perform the cognitive balancing act that their job requires through the exercise of what is referred to as “judicial discretion”, meaning that it is up to the individual judge to take account of all of the factors as he or she sees fit in each case.

In England and Wales, the origins of judicial discretion in sentencing are inextricably linked to mitigation. Towards the end of the 19th century, when the severity of prescribed sentences began to be mitigated in appropriate cases, this was accomplished by giving judges wide discretion to tailor the sentence to the individual facts of the case (Thomas, 1977, 1979). Over the last century or so, judicial discretion has since become “the central principle of the English sentencing system” (Thomas, 1982, p. 473).

The judiciary tend to view discretion as essential for individualised justice, the argument being that every case and every offender is unique, and so the sentencer must be permitted to use his or her judgment to reach a sentence that is fair given the specific circumstances of each individual case (Ashworth, 2015; Jacobson & Hough, 2007; House of Commons Justice Committee, 2009; Tata, 2000). Discretion is also seen as important for maintaining the independence of the judiciary from the legislature, a cornerstone of English constitutional law. Although the courts’ sentencing powers can be regulated by statute, judges retain the power to deal with individual cases, within the framework determined by Parliament (Ashworth, 2010).

1.1.1. Judicial Discretion Leads to Sentencing Disparity

The exercise of judicial discretion has long been recognised as a source of inconsistency and bias in sentencing. As early as 1877, Serjeant Cox (1877, quoted in Crackanthorpe, 1902, p. 852) noted that, “the judge on one side of a wall might often be found passing one sentence, the judge on the other side passing quite another, for offences identical in name and similar in character”. Crackanthorpe himself observed that “the liberty of the subject must not be left to depend on caprice or whim of any judge, however highly placed” (Crackanthorpe, 1902, p. 856).

Research shows that judicial discretion does lead to disparity in sentencing outcomes. Sentencing disparity has been defined as “a form of unequal treatment that is often of unexplained cause and is at least incongruous, unfair and disadvantaging in consequence” (Hagan & Bumiller, 1983, p. 9). There are many legitimate reasons why different offenders should be treated differently, such as the severity of their offence and their past criminal record. Disparity refers specifically to the unequal treatment of offenders that is “unexplained” in the sense that it cannot be justified on the basis of legitimate legal factors.

It is possible to distinguish two forms of sentencing disparity. First, comparable offenders may be treated differently based on “extra-legal” factors – characteristics such as race and gender which, as a matter of law, should not be taken into account. Second, individual judges and/or courts and/or court districts may interpret legal (and/or non-legal factors) differently from one another, leading to comparable offenders receiving different sentences depending on where and by whom they are sentenced. The latter form of disparity is typically referred to as inconsistency. Consistency in punishment is viewed as “a fundamental element in any rational and fair system of criminal justice” (Mason J in *Lowe v The Queen*, 1984, pp. 610-611). In England and Wales, the Sentencing Council has a statutory obligation to consider the need to promote consistency in sentencing (Coroners and Justice Act 2009, s120(11)(f)).

Sentencing disparity has been identified in many different jurisdictions (Goodman-Delahunty & Sporer, 2010; Sporer & Goodman-Delahunty, 2009). The next two sections contain summaries of past research into disparity based on extra-legal bias and disparity based on inter-judge/court/district inconsistency respectively.

1.1.1.1. Disparity based on extra-legal factors. There is an extensive body of empirical research that has found sentencing disparity resulting from extra-legal factors. The following section summarises a representative selection of that research. The majority of evidence comes from the USA (where more detailed data sets are typically available) but there are also several studies from England and Wales and, to a lesser extent, from other jurisdictions. Researchers have tended to use one of two methods to examine disparity, namely statistical analysis of archival sentencing data or experimental designs.

Statistical studies of sentencing data have regularly found racial bias in sentencing outcomes. Black offenders are typically more likely to go to prison and receive longer custodial sentences than white offenders (Albonetti, 1997; Brennan, 2006; Demuth & Steffensmeier, 2004; Fearn, 2005; Feldmeyer & Ulmer, 2011; Hood, 1992; Steffensmeier & Demuth, 2000; for reviews, see Mitchell, 2005 and Spohn, 2000). Findings also suggest there are various nuances in terms of where and when race matters – race effects have been found to be mediated by other factors including gender, age, socio-economic status, and community demographics (Britt, 2000; King, Johnson, & McGeever, 2010; Kramer & Ulmer, 2009; Nowacki, 2016; Steffensmeier & Demuth, 2006; Ulmer & Johnson, 2004; Wang & Mears, 2009). In Canada and Australia, some studies have found that indigenous offenders are sentenced more harshly than others (Lockwood, Hart, & Stewart, 2015; McGrath, 2016; Snowball & Weatherburn, 2007; Tonry & Frase, 2001), while others have found evidence for the opposite effect (Bond, Jeffries, & Weatherburn, 2011; Jeffries & Bond, 2012).

Statistical research also suggests that female offenders are less likely be imprisoned, and receive shorter custodial sentences than male offenders (Daly & Bordt, 1995; Flood-Page & Mackie, 1998; Franklin & Fearn, 2008; Hedderman, 1991; Hedderman & Dowds, 1997; Johnson, Kennedy, & Shuman, 1987; Moxon, 1988; Speed & Burrows, 2006; Steffensmeier, Kramer, & Streifel, 1993). The gender effect holds true across all racial groups (Doerner & Demuth, 2010; Steffensmeier & Demuth, 2006) unless a female offender's behaviour violates traditional gender role expectations (e.g., infanticide - Finkel et al., 2000; Oberman, 2003). However, there is also evidence that women are more likely to receive a community sentence rather than a fine, compared to men (Dowds & Hedderman, 1997).

Both experimental and statistical studies have identified a curvilinear effect of age on sentencing: sentencing severity is lower for offenders aged 20 or below, peaks between 21 and 29 and then declines gradually over time, with offenders aged 60 or over receiving the most lenient sentences of all (Doerner & Demuth, 2010; Doron, 2012; Johnson, van Wingerden, & Nieuwbeerta, 2010; Mueller-Johnson & Dhami, 2010; Steffensmeier, Kramer, & Ulmer, 1995; Steffensmeier & Motivans, 2000).

Experimental studies have found that low socio-economic status (SES) defendants are more likely to receive greater punishment than high SES defendants (Freeman, 2006; Mazzella & Feingold, 1994). Mazzella and Feingold's (1994) meta-analysis of 20 studies from the 1970s and 80s found a significant effect of low SES for rape cases but not for homicide. There is also experimental and observational evidence that physical appearance may influence sentencing. First, physically attractive offenders may receive more lenient sentences for robbery and rape (Mazzella & Feingold, 1994; Stewart, 1980) and for fraud (only when male offenders were judged by women – Shechory-Bitton & Zvi, 2014). Second, offenders with “trustworthy” faces may be less likely to receive the death penalty (Wilson & Rule, 2015).

Research suggests that victim characteristics also affect sentence severity (for an overview, see Glaeser & Sacerdote, 2003). In the USA, murderers are more likely to be sentenced to death if the victim is white and/or female (Holcomb, Williams, & Demuth, 2004; Paternoster et al., 2003; Paternoster & Brame, 2008; Stauffer, Smith, Cochran, Fogel, & Bjerregaard, 2006; United States General Accounting Office, 1990; Williams, Demuth, & Holcomb, 2007; Williams & Holcomb, 2004). Offenders guilty of non-capital homicide also tend to receive longer sentences if their victim is female (Curry, Lee, & Rodriguez, 2004; Franklin & Fearn, 2008; Johnson, van Wingerden, & Nieuwbeerta, 2010). In a Dutch study, Johnson et al. (2010) also found interactions between offender and victim gender: men killing other men and women killing other women were sentenced equivalently, men killing women received longer sentences, and women killing men received shorter sentences. Lastly, Johnson et al. (2010) also found that homicide offenders were sentenced much more severely if their victims were under 12 and somewhat more severely where victims were over 30.

1.1.1.2. Disparity based on inter-judge/court/district inconsistency. Several studies both in the USA and the UK have identified disparities arising from inconsistency across courts and/or individual judges.

In the USA, many statistical analyses of sentencing data using various kinds of regression modelling have identified inconsistency in outcomes across courts and/or court districts across various states, as well as at a federal level (for a comprehensive review, see Ulmer, 2012). Sentencing severity has been found to correlate negatively with, amongst other things, court caseloads (Kramer & Ulmer, 2009; Ulmer & Bradley, 2006) and the availability of local jail space (Johnson, 2006), and correlate positively with community levels of victim participation in sentencing, conservative attitudes to law and order (Helms, 2009), and religious homogeneity (Haynes, 2011; Ulmer, Bader, & Gault, 2008). Haynes, Ruback and

Cusik (2010) found that the composition of courtroom “workgroups” (judge, prosecutor and defence attorney) also influenced sentencing outcomes.

In addition, the effect of offender characteristics on sentencing is conditioned by court- and district-level factors. For example, racial disparities in sentence length and imprisonment rate have been found to increase in districts with larger black minority populations (Ulmer & Johnson, 2004; Wang & Mears, 2010; Weidner, Frase, & Schultz, 2005), but decrease as black representation amongst criminal prosecutors increases (Farrell, Ward, & Rousseau, 2009; King, Johnson, & McGeever, 2010).

In England and Wales, there is wide variation in the proportion of offenders given immediate custody, community sentences or fines, and in custodial sentence lengths, across criminal justice (police and prosecution) areas (Mason, de Silva, Sharma, Brown, & Harper, 2007; Ministry of Justice, 2010). In theory, this variation could be the result of differences in the overall profile of cases dealt with by the different areas. However, Mason et al. (2007) found that the inconsistency in sentencing across criminal justice areas was not well-explained by differences in the characteristics of cases or offenders dealt with by the criminal justice areas. Tarling (2006) reached a similar conclusion following analysis of data across 30 magistrates’ courts: cross-court disparity in the use of sentence types could not be accounted for by differences in the courts’ caseload profile.

Pina-Sánchez and Linacre (2013) used linear regression analysis to explore inconsistency in the sentencing of assault cases across 75 Crown Court centres. The study found that only 1.8% of sentence variability was due to difference between courts. It was also found that of three mitigating and six aggravating factors tested, all but two were applied consistently across courts. However, the study excluded 38 out of 47 mitigating and aggravating factors listed in the assault guidelines. In addition, the authors were unable to

evaluate possible geographical disparities based on extra-legal factors such as offenders' race, gender, or age, or inter-judge disparities within Crown Court centres. To date, the possible causes of inter-court inconsistency have not been investigated empirically in England and Wales.

Statistical analyses of sentencing data have found significant inter-judge disparities in sentence severity, and in the extent to which judges' sentences were affected by extra-legal offender characteristics including race, age, gender, and their interaction (Anderson & Spohn, 2010; Johnson, 2006; Wooldredge, 2010). Interview and focus group studies carried out by Davies and Tyrer (2003), Hough, Jacobson and Millie (2003), Jacobson and Hough (2007), and Raynard, Heberton and Pease (1994) all found substantial variation in judges' sentencing practice, including the severity of their sentences and their approach to the use of aggravating and mitigating factors.

To date, there has been relatively little research into the possible causes of inter-judge variation. Studies have found correlations between sentencers' attitudes to retribution, deterrence and incapacitation and length of punishment given (de Keijser, van der Leeden, & Jackson, 2002; Sporer, 1982). Various sentencer characteristics may also have an effect on sentence severity, although the evidence is equivocal. Steffensmeier and Hebert (1999) found that female judges gave somewhat harsher sentences, especially for repeat black offenders, but Johnson (2014) found the opposite effect. Some researchers have found ethnic minority judges more likely to imprison offenders (Steffensmeier & Brit, 2001), while others have found them to be less punitive (Johnson, 2006, 2014), or found no difference (Spohn, 1990). Studies have also found interactions between sentencer and offender characteristics. For example, Gazal-Ayal and Sulitzeanu-Kenan (2010) found in-group ethnic bias amongst both Jewish and Arab judges in Israeli bail decisions; Rachlinski, Johnson, Wistrich and Guthrie (2009) found that when given hypothetical sentencing scenarios, black judges were more

likely to convict a white defendant but white judges' decisions were unaffected by the defendant's race.

The impact of sentencers' age and experience is also unclear, with some studies finding that they affect sentencing severity, and others finding no effect (Diamond, 1990; Gilchrist & Blissett, 2002; Johnson, 2006, 2014; Speed & Burrows, 2006; Wooldredge, Griffin, & Thistlethwaite, 2013). It is likely that sentencer attitudes, gender, race, age and experience all have an effect on sentencing, but the extent of their effect varies depending on the sentencer (and court, district, and/or jurisdiction) involved, and on complex interactions between characteristics.

1.1.2. Psychological Explanations for Sentencing Disparity

Psychological theory can provide important insights into the possible reasons why discretionary sentencing produces disparities, as well as identifying other limitations on human judgment that are likely to affect discretionary sentencing. On the one hand, some theories that have been advanced specifically to explain sentencing disparity are based on psychological phenomena. On the other hand, psychological research has identified a number of issues arising from human intuitive judgment that are relevant to the sentencing domain. The following two sections cover these two areas of research in turn.

1.1.2.1. Theories specific to sentencing. The three most influential psychological theories of sentencing disparity were actually developed by criminologists, rather than psychologists. First, Albonetti (1987, 1991) proposed that legal decision makers have to make important decisions using limited and often ambiguous information about highly relevant issues such as an offender's risk of reoffending and rehabilitative potential. In order to avoid or minimise the resulting uncertainty, sentencers make causal attributions about

reoffending and/or rehabilitation (a.k.a. “perceptual shorthand”) based on stereotypes relating to race, gender, and other extra-legal characteristics (see also Farrell & Holmes, 1991).

Second, the “focal concerns” theory of sentencing (Kramer & Ulmer, 2009; Steffensmeier, Ulmer, & Kramer, 1998) proposes that sentencers determine sentences by reference to three focal concerns of punishment: blameworthiness, community protection (i.e., offender dangerousness/rehabilitative potential), and practical constraints. This in itself amounts to little more than a simplified restatement of the goals of sentencing. The difference is that focal concerns theory proposes (like Albonetti’s causal attribution theory) that when evaluating their focal concerns, sentencers use both legal factors and stereotype-driven assumptions based on extra-legal factors.

Third, the “court community” perspective views sentences as “joint social acts” (Ulmer, 2012, p. 7) that represent the sentencing norms of a distinctive culture unique to each court (Kramer & Ulmer, 2009). The presence of distinct court communities that are influenced by the political, social and organisational context in which each court operates may, in the absence of a structured sentencing system, lead to inter-court sentencing disparity (Eisenstein, Flemming, & Nardulli, 1988; Flemming, Nardulli, & Eisenstein, 1992; Ulmer, 1997).

Perceptual shorthand and focal concerns theory have been very influential on recent sentencing research but both lack precision in terms of generating specific testable behavioural hypotheses. Perhaps because of this (at least in part), very little empirical research appears to have been done to test either theory directly, except in the general sense that studies finding sentencing disparities based on offenders’ extra-legal characteristics are consistent with both theories, as are findings of inter-judge disparities. A rare exception is Bridges and Steen (1998), who tested Albonetti’s theory and found that probation officers’

attributions about the causes of crime differed between white and minority youths, and that those attributions contributed to differential assessments of youths' risk of reoffending and sentence recommendations (after adjusting for legally relevant offence and offender factors). Similarly, empirical support for the court communities perspective is mostly limited to studies that show inter-court disparities in the effects of legal and/or extra-legal factors (e.g., Kautt, 2002; Ulmer, 2005) but do not link those disparities to differences in court culture. An exception here is Haynes, Ruback and Cusik (2010), who found that relatively stable court workgroups, whose members worked in the same location and shared the same law school, were less likely to give prison sentences.

1.1.2.2. Limitations on human judgment that affect sentencing. Decision science research has identified a number of issues arising from human intuitive judgment that are relevant to the sentencing domain. Decision science is an inter-disciplinary field that combines decades of research by cognitive psychologists and behavioural economists. The underlying principle of decision science is that people's ability to make decisions is a function of basic cognitive abilities such as memory, attention and perception. Findings from decision science have been successfully applied to several domains, including medicine (e.g., Blumenthal-Barby & Krieger, 2015; Marewski & Gigerenzer, 2012), intelligence analysis (e.g., Belton & Dhimi, 2016; Dhimi, Mandel, Mellers, & Tetlock, 2015; Heuer, 1999), public policy (e.g., Bhargava & Loewenstein, 2015; Thaler & Sunstein, 2008), and the law (e.g., Dhimi, 2003; Dhimi & Ayton, 2001; Englich, Mussweiler, & Strack, 2006; Guthrie, Rachlinski, & Wistrich, 2001; von Helverson & Rieskamp, 2009).

Dual-process theorists (e.g., Epstein, 1991; Evans & Over, 1996; Kahneman, 2011; Sloman, 1996; Stanovich & West, 2000) have identified two modes of human cognition with distinct characteristics. Intuition is unconscious, automatic, holistic, fast and relatively effortless. Conversely, analysis is conscious, controlled, deliberative, slow and effortful.

Alternatively, Hammond (1996, 2000) proposed that there is a continuum between intuition and analysis and argued that the mode of cognition used (intuition, analysis or a “quasirational” combination of the two) is determined by properties of the judgment task. Cognitive tasks may be distinguished from one another based on the mode of cognition they are likely to induce (Dhimi, Belton, & Goodman-Delahunty, 2015; Dhimi & Thomson, 2012).

Discretionary sentencing is a task that involves experienced judges integrating a large number of factors, some of which may be highly inter-correlated and many of which must be subjectively interpreted, and choosing from several response options (i.e., sentence types). These are all characteristics identified by Hammond (1996) as likely to promote primarily intuitive judgment (Dhimi, Belton, & Goodman-Delahunty, 2015). This conclusion is supported by qualitative research that suggests sentencers trust their intuition and “just do it” (Jacobson & Hough, 2007, p. 48). Judges tend to describe sentencing as an intuitive process, using terms such as “instinct”, “experience”, “feel”, “hunch”, and “gut feeling” (Ashworth, Genders, Mansfield, Peay, & Player, 1984; Hutton, 2006; Lock, 2015; Mackenzie, 2006; see also Study 2 in this thesis).

Several psychological perspectives have highlighted problems with intuitive judgment. Those described below have either been shown to apply directly to sentencing judgments or are theoretically relevant to them, based on their proven effects in other legal contexts.

First, Kahneman, Tversky and colleagues proposed that we have evolved to make fast and effortless unconscious decisions based on simple, rule of thumb principles or “heuristics”, which although often useful can cause individuals to deviate systematically from normatively rational behaviour (Gilovich, Griffin, & Kahneman, 2002; Kahneman, 2011; Kahneman,

Slovic, & Tversky, 1982). Many such deviations or “cognitive biases” have since been identified, including in a variety of legal contexts.

One frequently identified cognitive bias, “anchoring”, is the tendency to make quantitative estimates “by starting from an initial value that is adjusted to yield the final answer [and]... adjustments are typically insufficient” (Tversky & Kahneman, 1974, p. 1128). Studies suggest that judges’ sentencing decisions may be significantly affected by numerical anchors (Englich, Mussweiler, & Strack, 2005, 2006; Guthrie, Rachlinski, & Wistrich, 2001, 2007; Rachlinski, Wistrich, Johnson, & Guthrie, 2009; Rachlinski, Wistrich, & Guthrie, 2015) even where these are irrelevant (Englich & Mussweiler, 2001; Englich, Mussweiler, & Strack, 2006; although relevant anchors have a stronger effect: Glöckner & Englich, 2015), or presented subliminally (Mussweiler & Englich, 2005). The anchors may be received from various sources including the prosecution’s sentencing demand (Englich, Mussweiler, & Strack, 2005) and appear to affect expert judges and novices equally (Englich, Mussweiler, & Strack, 2006; Guthrie, Rachlinski, & Wistrich, 2001).

“Confirmation bias” refers to people’s tendency to search for and interpret information in a way that confirms a pre-existing theory or assumption (Klayman, 1995; Wason & Johnson-Laird, 1972), especially where information is presented sequentially, as is the case in a sentencing hearing (Jonas, Schulz-Hardt, Frey, & Thelen, 2001). Recent experimental research suggests that judges are susceptible to confirmation bias. Helm, Wistrich and Rachlinski (2016) found that both arbitrators and judges preferred to search for confirmatory evidence over disconfirming evidence in an employment discrimination claim. Schmittat and Englich (2016) found that judges given a sentencing scenario evaluated evidence supporting their preliminary decision as stronger and more credible than evidence conflicting with it (although they were less biased than laypeople).

Judges and other legal decision-makers (e.g., lawyers) have also been found to be susceptible to several other cognitive biases. Examples include “framing”, where choices are affected by the way in which information is presented, or “framed”; “hindsight bias”, the tendency to overestimate the predictability of past events; and “normality bias”, the tendency to react more strongly to negative outcomes that come from abnormal as opposed to normal circumstances (Belton, Thomson, & Dhimi, 2014; Guthrie, Rachlinski, & Wistrich, 2001, 2007, 2009).

Second, the “fast and frugal heuristics” research program (e.g., Gigerenzer, 2002; Gigerenzer & Gaissmaier, 2011; Gigerenzer & Goldstein, 1996; Gigerenzer, Hertwig, & Pachur, 2011; Gigerenzer, Todd, & the ABC Group, 1999) is concerned with modelling the heuristic decision processes that underpin intuitive thought. Like heuristics and biases researchers, Gigerenzer and colleagues propose that we often use simple decision strategies to deal with complex decision problems. For example, where a number of relevant factors must be incorporated into a decision, rather than weighting and balancing them in a compensatory way, we may adopt simpler, often non-compensatory strategies based on limited information. Researchers have produced step-by-step process models of these strategies, which are referred to as “fast and frugal” because they search for and use limited information in a short time period.

Fast and frugal heuristics are frequently “ecologically rational”, in that they can match or outperform far more complex strategies in appropriate environments (Gigerenzer & Goldstein, 1996). However, if used in a legal context they will often be at odds with the process prescribed by law. For example, when making bail decisions, judges are expected to take account of all available relevant information. However, Dhimi and Ayton (2001) found that when predicting judges’ bail decisions on hypothetical cases involving nine cues, a simple, non-compensatory strategy that used only a few cues (only one was used by 75% of

participants) predicted judges' behaviour better than compensatory strategies that used all nine cues. Von Helversen & Rieskamp (2009) found that judges' sentencing decisions (both custodial sentence length and fine amount) were better predicted by a relatively simple – albeit compensatory – heuristic model that only took account of a limited number of factors than by models that integrated all legally relevant factors.

Third, the existence of 'implicit bias', judgment bias that is "introspectively unidentified (or inaccurately identified)" (Lane, Kang, & Banaji, 2007, p. 429) is generally considered beyond reasonable doubt (Jost et al., 2009, Lane, Kang & Banaji, 2007; but see Tetlock & Mitchell, 2009). The Implicit Association Test (IAT - Greenwald, McGhee, & Schwartz, 1998) assesses the strength of implicit associations between characteristics such as race, gender, age, or religion, and positive or negative attitudes, using a reaction time measure. Over 2.5 million people have been tested via the Project Implicit website - <http://implicit.harvard.edu/> (see e.g., Nosek et al., 2007) and elsewhere. IAT scores have been found to correlate to a moderate degree with various measures of behaviour (see Greenwald, Poehlman, Uhlmann, & Banaji, 2009; Lane, Kang, & Banaji, 2007).

Several academics have highlighted the likely relevance of implicit bias to legal decision making (Bagenstos, 2007; Banks, Eberhardt, & Ross, 2006; Jolls, 2007; Jolls & Sunstein, 2004, 2006; Kang, 2005; Kang et al., 2012; Krieger, 1995; Krieger & Fiske, 2006; Lane, Kang, & Banaji, 2007). Rachlinski, Johnson, Wistrich and Guthrie's (2009) experimental study of US circuit judges linked IAT results to decisions made in hypothetical criminal cases. The study found clear in-race bias amongst Caucasian judges but no clear preference in the African American judges. However, African-American judges were more likely to convict a Caucasian defendant than an African-American defendant, while Caucasian judges' conviction decisions were unaffected by the race of the defendant. Conversely, African-American judges with a stronger in-race preference in the IAT were less

likely to convict an African-American defendant. Perhaps surprisingly, this was also true for those Caucasian judges who exhibited a strong in-race preference in the IAT, which Rachlinski and colleagues concluded may be evidence of some judges' ability to compensate for their implicit attitudes.

1.1.3. Can Judicial Expertise Generate Skilled Discretion?

One argument for the efficacy of intuition in sentencing comes from the notion of sentencers as experienced experts in their field. There is a common view amongst judges that sentencing expertise can only "be absorbed through the experience of doing it" (Wasik, 1993, p. 44). "Judicial experience in sentencing is a skill... Repeated exercise in synthesising sentencing factors can only hone the instinct required to translate such factors into just numerical outcomes." (McHugh J in *Markarian v The Queen* (2005) at [78]). Michael Kirby, the Australian High Court judge, has described intuition as "simply the application to a particular case of the accumulated experience of professional life" (Kirby, 1998). Similarly, retired South African judge Albie Sachs notes that "[b]y the time one is appointed to sit on a Court like ours, one's intuitions are not based on blind, untutored and highly subjective predilections. ... Life experiences... have been filtered and transmuted into an evolving lexicon of legal principles which I share with others who have followed quite different journeys." (Sachs, 2011, p49; see also Hastie & Viscusi, 1998).

There is certainly evidence that intuition can be an effective decision-making tool in certain contexts. Simon has proposed that "[i]ntuition is nothing more and nothing less than recognition" (Simon, 1992, p155). Klein and colleagues' model of "recognition-primed decisions" (RPD) builds on research into chess masters and proposes that experts can draw on a repertoire of patterns compiled over time to identify a plausible option, which, if appropriate, is then implemented or adapted as required to fit the situation at hand (Klein,

Calderwood, & Clinton-Cirocco, 1986). Studies using the RPD model have found evidence of effective skilled intuition in the fields of firefighting, system design, military command and management of offshore oil installations (Klein, 1998, 2003).

However, research suggests that effective intuition relies on learning appropriate decision strategies and using them consistently. An individual may only be able to develop effective intuition when he/she has rapid, unequivocal feedback on his or her performance (Glöckner & Witteman, 2010; Hogarth, 2001; Kahneman & Klein, 2009; Shanteau, 1992), and even feedback may not be enough to facilitate learning of some complex tasks (Harvey, 2011). Sentencers do not receive any regular, reliable feedback about whether their sentencing judgements are effective or not. There is no way for a judge to know whether a particular offender reoffends (unless they happen to appear before them in court again). Official statistics on issues such as recidivism rates may sometimes be available but these are averages over offence types, offender types and court types, and tend to be unreliable (Hedderman, 2009; Richards, 2011). Sentences can be appealed, but in practice this rarely happens: in England and Wales in 2011, appeals were heard for only 0.5% of magistrates' court sentences and 2% of Crown Court cases (Jacobson, 2013). In addition, appeals are only likely to overturn manifestly inappropriate sentences, unless an error of fact or law is involved.

The lack of feedback makes sentencing a “wicked” learning environment (Hogarth, 2001), in which sentencers may only be able to develop skilled intuition regarding the “going rate” tariff for a particular combination of offender and offence factors based on what they have done in the past and ad hoc discussions with colleagues about comparable cases. But, of course, those going rates could be consistently unjust – influenced by extra-legal factors or arrived at without taking account of all relevant information – and may differ substantially

from judge to judge and court to court. The research cited above suggests that this is indeed what happens in practice.

Sentencers often seek refuge in the aphorism that there is such a thing as an incorrect sentence, but there is no such thing as a correct sentence (Cavadino, Dignan, & Mair, 2013; Roberts, Padfield, & Harris, 2016; *R v Ellis*, 1986; two of the judges interviewed in Study 2 also expressed this view). The rationale seems to be that as long as the sentence reached is roughly in line with the going rate for an offence and offender with a given set of legal characteristics (i.e., not manifestly wrong), then justice has been done (more or less). However, this way of thinking ignores the possibility, supported by the substantial body of research summarised above, that beneath such superficial consistency of approach may lie patterns of inconsistency and bias, where offenders with certain extra-legal characteristics are treated systematically differently than others, and comparable offenders receive different treatment depending on characteristics of the sentencers before whom they appear.

In summary, the intuitive judgment induced by discretionary sentencing creates disparities and has been shown to be biased and inconsistent in a number of ways. Decision science research strongly suggests that discretionary sentencing is adversely affected by several other judgment biases as well. Furthermore, discretionary sentencing lacks transparency and, as a result, undermines the public's sense of procedural justice. Lastly, sentencing is a wicked learning environment and so experience-based expertise is unlikely to reduce sentencers' susceptibility to bias. Taken together, these conclusions raise serious concerns for sentencing systems that rely heavily on judicial discretion.

1.2. Personal Mitigation in Sentencing – A Discretionary Process

Mitigation lies at the heart of the English and Welsh criminal justice system. In the nineteenth century, many offences still carried severe mandatory penalties (most notably, the

death penalty). Consequently, the primary function of the sentencer was to decide whether to mitigate the severity of the penalty which the law had appointed for the offence. As Cox (1877) put it, “the province of the judge is purely beneficent. The law affixes the punishment to the crimes and gives to the judge the power to mitigate that punishment, as in his judgment he may deem to be right, upon consideration of all the circumstances attending the particular case” (Thomas, 1977, p. 15, quoting Cox, 1877).

Mitigating factors continue to play an important role in sentencing today. They can be categorised as relating either to the offence or the offender. Offence-related mitigating factors include provocation or limited property damage. Personal Mitigating Factors (PMFs) are those that relate to characteristics of the offender, and include remorse, serious medical conditions, good character, family responsibilities, and taking steps to deal with drug or alcohol addiction.

1.2.1. Character-based PMFs

The present research chose to explore the influence of PMFs on sentencing judgments by focusing on three particular factors that it is argued have a central role to play in the mitigation process, namely, remorse, addressing addiction, and good character. Sentencing has been described as essentially a question of what one person (the sentencer) thinks about another (the offender): “are you looking at a fool... or someone who doesn’t give – anything?” (judge quoted in Jacobson & Hough, 2007, p. 48). From this perspective, sentencing is a holistic process where the sentencer integrates the facts of the case into a satisfying whole narrative, an overall view of the offender, his/her character and situation (Tata, 1997, 2007). This holistic perspective is analogous to leading psychological theories of legal decision-making including the “story model” (Pennington & Hastie, 1986, 1992), Bayesian approaches

(e.g., Lagnado, Fenton, & Neil, 2013) and cognitive consistency theories (e.g., Simon, Snow, & Read, 2004).

Sentencing is also an essentially moral or ethical judgment task. Hough, Jacobson and Millie (2003, p. 41) found that in cases on the cusp of custody, sentencers' judgments were "framed within a set of explicitly ethical concepts... [such as] the intentions and capabilities of the offender and his or her attitude towards the offence, and offending". Ashworth (2015, p. 199) describes sentencers' judgment on the custody threshold as "a kind of moral assessment of the offender and his or her prospects". This holistic moral assessment of the offender also reflects the approach taken by prosecution and defence counsel, each of whom will typically attempt to construct a coherent overall picture of the offender as either suitable for community punishment or requiring custody (Ashworth, 2015). There is evidence that the public also perceive sentencing holistically, evaluating offenders as, for example, "foolish" or "a loser" (Lovegrove, 2011, p. 45).

If mitigation involves a global assessment of the offender's morality (Ashworth, 2015; Fitzmaurice & Pease, 1986), then certain PMFs such as remorse, addressing addiction, and good character, are likely to play a central role in that assessment. Each of these "character-based" PMFs involves behaviour – either in response to an offence, or otherwise – that illustrates something about the offender's underlying character. To use the terminology of perceptual shorthand and focal concern theories (Albonetti, 1987, 1991; Kramer & Ulmer, 2009; Steffensmeier, Ulmer, & Kramer, 1998;), the information these three PMFs provide about offenders' moral characters is likely to influence sentencers' causal attributions about those offenders' reasons for offending, and the likelihood of them reoffending or responding positively to rehabilitative efforts. An offender perceived as basically a good person who had a "moment of madness" may be given a community sentence, while someone perceived to be a "ne'er-do-well" may have more chance of being sent to prison.

Hough, Jacobson and Millie (2003) cite remorse and the determination to stop offending as two factors that sentencers perceive as particularly important when making the choice between custody and a community sentence (see also Millie, Tombs, & Hough, 2007). The vital importance of character-based PMFs for sentencing, especially for offenders on the cusp of custody, means that it is critical for sentencers to approach these factors in a consistent, principled, and unbiased way. For this reason, the present research is focused on character-based PMFs, as distinct from those that relate, for example, to criminal culpability (age and/or lack of maturity, mental disorder), ability to deal with punishment (serious medical conditions), or external personal circumstances (sole or primary carer).

1.2.2. The Current Status of PMFs in England Wales

Sentencing statistics from the Crown Court² in England and Wales suggest that the presence of one or more PMFs reduces both the likelihood of an offender receiving an immediate custodial sentence and the average custodial sentence length (Sentencing Council, 2012, 2013a, 2014, 2015a). Many PMFs occur frequently (e.g., in 2014, remorse was mentioned in 21% of all burglary cases – Sentencing Council, 2015a). In addition, many cases involve the co-occurrence of more than one PMF (in 2014, 56% of cases involved 2 or more PMFs – Sentencing Council, 2015a). Research with sentencers has also found that PMFs may substantially influence sentencing, in particular by tipping the balance for borderline cases in favour of non-custodial sentences (Hough, Jacobson, & Millie, 2003; Jacobson & Hough, 2007; Millie, Tombs, & Hough, 2007; Tombs & Jagger, 2006). However, very little is currently known about the relative influence that different mitigating factors may have on sentencing outcomes. A full review of the empirical literature to date is included at pp. 38-50 below.

² The Crown Court deals with relatively serious offences. “Indictable” offences, such as murder, rape and robbery, must be tried at the Crown Court. “Either way” offences, which include most types of burglary and assault, can be tried in either a magistrates’ court or the Crown Court.

Offence-specific sentencing guidelines currently exist in England and Wales for most common offences including assault, burglary, theft, and sexual offences (Sentencing Council, 2011a, 2011b, 2013c, 2016b; copies of the guidelines for assault and burglary are also included at Appendices 1 and 2). The current guidelines break the sentencing process into nine steps. At Step One, the sentencer determines the offence's category (from 1 to 3, with 1 being the most serious), which is based on an assessment of the harm caused and the culpability of the offender. Harm and culpability are determined by reference to an exhaustive list of factors that indicate greater or lesser harm and higher or lower culpability.

At Step Two, the sentence starting point and range are determined from the offence category. The sentence can then be adjusted up or down from the starting point, within the category range (or in exceptional cases, beyond it), depending on the presence of additional aggravating and/or mitigating factors. Step Three of each guideline allows for a reduction based on an offender giving assistance to the prosecution, Step Four requires an appropriate reduction for a guilty plea, and Step Five takes account of an offender's potential dangerousness (only for certain offences). Step Six requires the sentencer to ensure that, where an offender is sentenced for multiple offences, the overall sentence is proportionate (the totality principle). Step Seven deals with compensation and ancillary orders, Step Eight requires the sentencer to give reasons for his or her sentence, and Step Nine involves accounting for time served on remand.

Step Two of the guidelines includes a non-exhaustive list of the aggravating and mitigating factors that should be considered when deciding a sentence for that offence. Figure 1.1 shows the list of factors included in the guideline for common assault (Sentencing Council, 2011a, p. 25). Several PMFs are included in the right-hand column under "factors reducing seriousness or reflecting personal mitigation", including remorse and good character.

Aggravating and mitigating factors to be taken account of in a case of common assault.

Factors increasing seriousness

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Other aggravating factors include:

Timing of the offence

Offence committed against those working in the public sector or providing a service to the public

Gratuitous degradation of victim

Failure to comply with current court orders

An attempt to conceal or dispose of evidence

Commission of offence whilst under the influence of alcohol or drugs

Abuse of power and/or position of trust

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Factors reducing seriousness or reflecting personal mitigation

Remorse

Determination and/or demonstration of steps taken to address addiction or offending behaviour

Isolated incident

Lapse of time since the offence where this is not the fault of the offender

Mental disorder or learning disability, where **not** linked to the commission of the offence

Sole or primary carer for dependent relatives

23

the Court of Appeal on the relative weight of aggravating and mitigating factors for certain specific offences (e.g., driving causing death – *R v Richardson*, 2001).

However, there is currently no other guidance on when particular aggravating and mitigating factors should be applied, nor how multiple factors should be weighted and integrated to reach a sentence (Ashworth, 2010, 2011, 2015; Dhimi, 2013a, 2013b), nor the relative weight that those factors should be given in different contexts, such as different offence types and/or seriousness (Ashworth, 2010, 2011, 2015), nor how they should affect the custody threshold (Roberts, 2008). The one exception is a guilty plea, for which there is a separate guideline (Sentencing Council, 2017). In addition, the aggravating and mitigating factors listed in the guidelines are left undefined and therefore open to judges' subjective interpretation (Dhimi, 2013a). This approach appears to reflect a general view that aggravation and mitigation are best dealt with by the exercise of judicial discretion (Roberts, 2008, 2013). As discussed, however, relying on judicial discretion results in judgments that are inconsistent and adversely influenced by various psychological biases.

Ashworth (2011, p. 22) described the current treatment of aggravating and mitigating factors as "a sphere in which discretion has led largely to anarchy". He notes that while judges tend to resist the idea of allocating weight to individual factors, in practice each judge is bound to make particular assumptions about factors' relevance and weight. Jacobson and Hough (2007) carried out interviews with 40 Crown Court sentencers and found evidence for substantial variation in the way that sentencers apply PMFs. For example, opinion was divided over the weight to be given to a burglar's commitment to enter a drug treatment programme. Raynard, Hebenton and Pease (1994) identified striking differences in judges' weighting of the aggravating and mitigating factors set out in a Court of Appeal guideline judgment for rape cases.

One solution to the problems associated with intuitive judgment is to structure the sentencing task so that it induces a more analytical mode of cognition (Dhami, Belton, & Goodman-Delahunty, 2015). A more structured sentencing process can potentially reduce the bias and inconsistency that result from discretionary judgment. In England and Wales, the current system of offence-specific guidelines includes a consistent, step-by-step process to follow and lists of relevant factors, while still retaining sufficient flexibility to deal with unique elements of each individual case. A recent statistical analysis of data from the Crown Court found evidence that the inter-court consistency of sentencing for assault cases improved after the introduction of the sentencing guideline for assault (Pina-Sánchez & Linacre, 2014). However, as described above, the use of PMFs in sentencing remains relatively unstructured and sentencers must use their intuition to determine the weight given to each PMF on a case-by-case basis.

Researchers have repeatedly argued that the principles underlying the use of each specific PMF should be identified, and guidance provided on the use of these factors in practice (Ashworth, 2010, 2011, 2015; Dhami, 2013a, 2013b; Jacobson & Hough, 2007; Roberts, 2008). Roberts (2008) argues that since sentencing factors can determine whether an offender goes to prison or not, especially in borderline cases (Hough, Jacobson, & Millie, 2003; Maslen, 2015; Millie, Tombs, & Hough, 2007), “it is vital that sentencers apply them in a uniform manner” (Roberts, 2008, p. 264), while research to date suggests that they do not (Corbett, 1987; Davies & Tyrer, 2003; Jacobson & Hough, 2007; Raynard, Hebenton, & Pease, 1994). Roberts also asserts that the reasoning behind mitigation needs to be clarified because poorly understood sentencing factors can lead to public and media criticism of sentencers, especially when a factor leads to an offender escaping prison.

Dhami (2013a, 2013b), Roberts (2008, 2011) and Young and King (2011) have all proposed moving beyond unweighted lists of aggravating and mitigating factors (such as

those produced by Jacobson & Hough, 2007) towards guidance on the typical weight that each aggravating and mitigating factor might be given across different offences. Aggravating and mitigating factors “are clearly not all equally important” and sentencers “should be provided with some sense of the relative power of these factors”, particularly in relation to the custody threshold (Roberts, 2008, p. 270). Alternatively, Irwin-Rogers and Perry (2015) suggest that sentencing guidance could give examples of circumstances where each factor is likely to be particularly important or unimportant for sentencing. Ashworth (2015, p. 201) notes that the guilty plea discount and the enhancement of sentences for racial aggravation both already have to be quantified, which illustrates that “some arithmetical clarity is possible”.

Finally, Roberts (2008) and Ashworth (2010, 2015) agree that the Sentencing Council should specify the rationale behind each mitigating factor and give particular consideration to controversial factors such as having stable employment (which can indirectly discriminate against minority offenders), being under the influence of drugs or alcohol (which some view as an aggravating factor, and others as a mitigating factor – see Lightowlers & Pina-Sanchez, 2017; Padfield, 2011) and previous good character (which some argue should not be relevant - e.g., Ashworth, 2010; Maslen & Roberts, 2013).

Any proposal to increase the structure of a sentencing system must be supported by both descriptive and normative research. Policy-makers first need to understand how the system currently operates; this means using empirical research to find out how PMFs are applied in current sentencing practice, both individually and in combination. Separately, researchers need to re-examine the legal and policy-based principles behind those factors that are currently treated as PMFs. These two lines of research can then be integrated to reach evidence-based conclusions about whether the current approach to personal mitigation is

acceptable or improvements need to be made, for example by adding or removing certain PMFs and/or specifying the weight that they should be given in different contexts.

1.3. The Relevance of Public Opinion to Sentencing

Sentencing is not just a matter for sentencers. It is generally accepted that the legitimacy of the criminal justice system requires some level of correspondence between sentencing practice and public opinion about sentencing. There are several bases for arguing that public opinion on sentencing matters (Hough & Kirby, 2013; Wood & Tendayi, 2004). First, public confidence and trust in criminal justice is needed, since the effectiveness of the justice system depends on people respecting and ultimately complying with court judgments (Auld, 2001; Halliday, 2001; Morgan, 2002; Tyler, 2007). Trust is eroded if sentences are seen as unfair, and/or sentencers are viewed as out of touch with the values and attitudes of the general public (Henham, 2012; Lord Carloway, 2013). More specifically, the relevance of individual sentencing factors must be clear to the community, or misunderstanding and criticism of sentencing are likely to become issues (Roberts, 2008).

Acknowledging the relevance of public opinion “is not a surrender to the clamour of the mob; it is realistic recognition that a sentence widely seen as unjustifiably lenient (or harsh) may ultimately be damaging to the defendant himself and even, unless and until corrected, to the administration of criminal justice” (Bingham, 2000, p. 82). This viewpoint is reflected in the Sentencing Council of England and Wales’ stated goal of “increasing public understanding of and confidence in sentencing and the criminal justice system” (Sentencing Council, 2016a, “Additional functions”).

Second, the democratic accountability of government means that politicians must represent the interests of the electorate: “public opinion should be the ultimate basis of the law” (Green, 1996, p. 116; see also Faulkner, 2006). This in turn requires a sentencing policy

that is responsive to, and bounded by, public opinion (Yankelovich, 1991 – although responsiveness can become cynical populism; Hough & Kirby, 2013).

Third, it can be argued that in order to be fair, punishment should reflect shared cultural values (Robinson & Darley, 2007; Ryberg & Roberts, 2014). From this last perspective, the public's view is arguably just as valid as that of sentencers. Overall, wholesale "sentencing by plebiscite" (Roberts & Hough, 2014, p. 171) is obviously unappealing, and raises many issues including the erosion of judicial independence and the proper role of legal principles in the sentencing process (Roberts, 2014). However, a strong case can be made that sentencing practice, and sentencing guidelines, should fall at least "within the outer limits of public tolerance" (Hough & Kirby, 2013, p. 147; see also Walker, 1985).

There is conflicting evidence about whether public opinion on sentencing differs from sentencing practice. Hough, Bradford, Jackson and Roberts (2013) reviewed 25 years of surveys of the British public and found that throughout that period roughly 75% of those surveyed considered that criminal sentences were too lenient. Other studies have produced rather lower but still sizeable figures. Dawes, Harvey, McIntosh, Nunney and Phillips (2011) quote a figure of 65%, while the Ministry of Justice (2013) figure was 41%. A 2009 Ipsos MORI poll for the Home Office found that "punishment too lenient" was rated the equal most important crime issue facing Britain today (Ipsos MORI, 2010).

However, researchers have found that when survey respondents are given more information about sentencing, their attitudes tend to become less punitive (Chapman, Mirrlees-Black, & Brawn, 2002; Hough & Park, 2002; Salisbury, 2004). In addition, when the public are given detailed case facts and asked to decide sentences themselves, they can

often be less punitive than sentencers (Hutton, 2005; Lovegrove, 2007, 2010, 2011³; Mackenzie, Stobbs, Ferguson, & Gelb, 2014; Ministry of Justice, 2013; St Amand & Zamble, 2001; but see de Keijser, van Koppen, & Elffers, 2007). Real jurors in Australia who were asked to propose a sentence for a case they had just heard were found to make judgments very close to the actual sentence passed by the judge in their case (Warner & Davis, 2012; Warner, Davis, Spiranovich, Cockburn, & Freiberg, 2016).

In summary, there are strong reasons for asserting that public opinion is relevant to sentencing, and it is unclear whether, and to what extent, public opinion may diverge from current sentencing practice. If public opinion is relevant to sentencing as a whole, then it follows that public opinion about the importance of PMFs to the sentencing process should be taken into account when developing guidance or structure for the use of PMFs in sentencing. As with sentencers' use of PMFs, taking proper account of public judgments about PMFs requires empirical research to determine what those judgments are.

One particular area where public opinion and discretionary sentencing intersect is the issue of transparency. Intuitive judgment is necessarily unconscious (e.g., Epstein, 1991; Evans & Over, 1996; Kahneman, 2011; Sloman, 1996; Stanovich & West, 2000). Thus, the process by which a discretionary sentence is reached cannot be transparent. Sentencers will generally mention the factors they believe they relied on in making their decision, but they do not – and cannot, since the process is intuitive – confirm whether they did, in fact, rely on those factors (Dhimi & Ayton, 2001), or explain how the factors were weighted and integrated to arrive at a final sentence (Hutton, 2006). Consequently, it may be hard for those interested in the outcome of the case, including the offender(s), victim(s), family, friends, and

³ For a critique of Lovegrove's methodology and conclusions, see Roberts, Hough, and Ashworth (2011).

the wider public, to understand how the judgment was reached (Sentencing Council, 2013a).⁴ Studies show that the public believe sentences are the product of judges' own out-of-touch personal views (Mattinson & Mirrlees-Black, 2000; Roberts & Hough, 2005).

A growing body of research shows that when assessing the fairness of a legal judgment, people may care more about fair procedures than fair outcomes. The concept of "procedural justice" proposes that our perceptions of an authority's decision as fair or unfair are affected not just by the outcome of the decision but by whether the decision appears to be the result of an acceptable decision-making procedure (Folger, 1977; Thibault & Walker, 1975). Tyler (2006a) defines procedural justice in terms of four key expectations: (1) voice – the ability to express one's viewpoint; (2) neutrality – consistently applied legal principles, unbiased decision makers and transparency about how decisions are made; (3) respectful treatment – treating individuals with dignity and protecting their rights; and (4) trust – the belief that authorities are benevolent, caring and sincerely motivated to help litigants and treat them fairly.

Studies suggest that procedural justice is typically a more important determinant of satisfaction with the criminal justice system than outcome fairness (e.g., Casper, Tyler, & Fisher, 1988; Hough, Bradford, Jackson, & Roberts, 2013; Jackson et al., 2012; Rottman, 2005; Sunshine & Tyler, 2003; Tyler, Boeckmann, Smith, & Huo, 1997; Tyler & Huo, 2002) and its importance increases the more that an outcome is perceived as unfavourable (Brockner & Wiesenfeld, 1996). Procedural justice may reduce recidivism and enhance compliance with the law, because fair procedures cultivate the perception that authorities are both legitimate and moral (Paternoster, Brame, Bachman, & Sherman, 1997; Tyler, 2006b; Tyler, Sherman, Strang, & Barnes, 2007).

⁴ It also creates practical difficulties for both defence and prosecution counsel, who have to decide whether to appeal the sentence and, if so, on what grounds.

The principles of procedural justice predict that non-transparent, discretionary sentences are less likely to be accepted by the public as fair and more likely to provoke dissatisfaction and non-compliance with the criminal justice system than sentences generated by a transparent, structured process. It is therefore important to have a system that gives sentencers the opportunity to show to the public (and victims, offenders, and policy makers) that sentences are determined based on legitimate, objective criteria applied in a consistent, unbiased way, rather than based on an individual sentencer's whims or prejudices. In fact, one of the key goals of the Sentencing Council of England and Wales is to promote greater transparency in sentencing (Sentencing Council, 2016a).

1.4. Methods Used to Study Sentencing

Many different methodological approaches have been used to investigate sentencing judgments. These methodologies can be divided into two main categories: self-report methods and behavioural methods. Self-report methods involve asking people to report their own judgment strategies – for example, whether they took account of particular information in making their judgments and how important that information was. Self-report methods include surveys, interviews, questionnaires, and analysis of sentencers' reasons in reported cases. Behavioural methods aim to record observable behaviour only, such as judgments made and information that was present or absent during the judgment process. There is no reliance on participants' introspection about their behaviour. Behavioural methods include court observations, analysis of sentencing statistics and/or court records, and experiments.

1.4.1. Self-report Methods

Much sentencing research, including the majority of the research to date on PMFs in sentencing, has been carried out using surveys, questionnaires and/or interviews with sentencers or the public, or analysis of the reasons given by judges and magistrates in court or

in reported sentencing cases. Self-report methods do not permit researchers to draw conclusions about causal relationships between sentencing factors (such as PMFs) and sentence outcomes. This is because there is substantial evidence from psychological research that individuals cannot accurately describe the strategies they use when making judgments and/or that traditional post facto self-assessment approaches such as interviews and surveys are ineffective for this purpose (e.g., Galotti, Tandler, & Wiener, 2014; Newell & Shanks, 2014; Nisbett & Wilson, 1977; Wegner, 2002, 2004; Wilson, 2002). Interview- or survey-based approaches are also susceptible to social desirability response bias (Paulhus, 1991; Podsakoff, MacKenzie, Lee, & Podsakoff, 2003) and other method biases (Podsakoff, MacKenzie, & Podsakoff, 2012), which may produce unreliable or invalid data.

Studies of judgment and decision making that used experimental methodologies to determine people's judgment strategies have found that they differ substantially from people's self-reported judgment strategies (Arkes, 1981; Balzer, Rohrbaugh, & Murphy, 1983; Evans, Clibbens, Cattani, Harris, & Dennis, 2003; Slovic, Fleissner, & Bauman, 1972; Slovic & Lichtenstein, 1971), including in legal decision making contexts (Dhimi & Ayton, 2001; Dhimi & Harries, 2001; Konečni & Ebbesen, 1982, 1984; Sensibaugh & Allgeier, 1996; von Helversen & Rieskamp, 2009). Furthermore, these studies found that the experimentally captured judgment strategies predicted peoples' judgments significantly better than did their self-reports.

1.4.2. Behavioural Methods

1.4.2.1. Statistical analysis of archival data. The behavioural methodology most commonly used in sentencing research is statistical analysis of pre-existing sentencing data or data from court records. Statistical studies typically use one or other form of regression modelling to explore relationships between factors at various levels of the sentencing

structure (offender, judge, court, and/or district) and sentencing outcomes (see Dhimi & Belton, 2016). The most common source of data is sentencing statistics compiled by the courts or other governmental institutions. Archival sentencing statistics are a useful source of large-scale data across whole populations, but they often contain only a few case-level variables. In particular, sentencing statistics very rarely record mitigating or aggravating factors.

A recent source of archival data that does include comprehensive information on both mitigating and aggravating factors is the Crown Court Sentencing Survey (CCSS). Between 2010 and 2015, the CCSS collected data on approximately 60% of all cases sentenced in the Crown Court in England and Wales. A more detailed description of the CCSS is contained in the introduction to Study 1 (pp. 61-62).

The mitigating and aggravating factors recorded in the CCSS data are arguably self-report data in the sense that the decision-maker recorded which factors he or she took account of when deciding on the sentence. However, they are only self-report data in a limited sense, since unlike in self-report studies where sentencers were asked to rate the importance of one factor or another, CCSS forms did not require sentencers to give any indication of the weight given to particular sentencing factors in each case – they simply ticked a box to indicate whether the factor was present in the case or not. The weight given to each factor across the data set can then be estimated using statistical analysis (i.e., a behavioural methodology), as demonstrated in Chapter 2 of this thesis.

Another alternative is to collect and analyse the data recorded in court records. Court records contain substantially more data than is available in most sentencing statistics. However, it can be extremely time-consuming, costly and difficult for researchers to get access to such records and so they are rarely used in practice, at least in England and Wales

(Dhami & Belton, 2015; Dhami & Souza, 2009a, 2009b; Merrall, Dhami, & Bird, 2010). A third option is to collect observational data in court; to date, sentencing researchers have only used observational data to produce descriptive statistics or for qualitative analysis (e.g., Shapland, 1981; Jacobson & Hough, 2007), once again preventing cause-effect conclusions about judgment strategies.

Studies involving analysis of statistics, court records, or observations generate findings that are externally valid, since they record sentencers deciding on real cases. However, they are still somewhat limited in their ability to determine causal relations between sentencing factors and outcomes. Regression analysis is correlational and so can only provide evidence of associations, not confirm that the presence of a given factor is causally related to a particular outcome. In addition, researchers cannot take account of every possible factor that could have influenced particular cases in one way or another – they can only analyse the data recorded in the files, or referred to in court. Nevertheless, statistical analysis of court data can provide a good indication of the likely impact of sentencing factors on sentences and, perhaps for this reason, it has become a very popular approach amongst sentencing researchers; for example, Dhami and Belton (2016) identified 30 studies since 2000 that have used multilevel regression modelling to analyse sentencing data.

1.4.2.2. Experimental designs. An alternative behavioural method for the study of human judgment that is common in decision science is the use of experimental designs. Experimental designs involve systematically manipulating one or more independent variable(s), either by varying the stimuli given to two or more randomly assigned groups of people, or by giving the same people several different versions of the stimuli. The effect of the independent variable(s) on one or more dependent variables is then measured, while controlling for any other variables that could potentially influence the dependent variable(s) (by holding them constant or allowing them to vary randomly). Consequently, experimental

findings can be used to draw conclusions about cause-effect relationships between the independent and dependent variables studied. Past research has used experimental designs to study the effect on sentencing judgments of several variables including offender remorse, age, race, social class, and ill health, and sentencer age and gender (Corwin, Cramer, Griffin, & Brodsky, 2012; Forsterlee, Forsterlee, Horowitz, & King, 2006; Higgins, Heath, & Grannemann, 2007; Loeffler & Lawson, 2002; Mueller-Johnson & Dhami, 2010; Rachlinski, Guthrie, & Wistrich, 2013).

One long-standing programme of research in decision science is social judgment theory (Cooksey, 1996; Doherty & Kurtz, 1996; Hammond, Stewart, Brehmer, & Steinman, 1975). In reality, social judgment theory is not a theory, since it does not provide any testable hypotheses about human judgment (Dhami & Harries, 2001). Hammond (e.g., Hammond et al., 1975) described it as a “meta-theory” because it provides a structure for investigating decision making, rather than presenting a theory of decision making as such. Social judgment theory is focused on describing the processes people use to carry out specific real-world judgment tasks, without relying on people’s verbal explanations of their introspections regarding their judgment processes (Hammond et al., 1975). The ultimate hope of social judgment theory research is that by showing people the strategies they actually use to make judgments, their judgments can be aided and/or improved in future.

Social judgment theory is built around a method called “policy capturing”. Policy capturing involves several steps. The first step is identifying the judgment task (e.g., determining an offender’s sentence). This step also involves identifying the variables, or “cues” that individuals use to complete the task. In the case of sentencing, the relevant cues will include aggravating and mitigating factors. The researcher then asks an individual to make judgments about a series of cases that are representative of the judgment task (e.g., a set of hypothetical sentencing scenarios) while the cues are manipulated systematically (e.g., by

varying which aggravating and/or mitigating factors are present or absent). Lastly, the data collected is used to build a statistical model of how the cues influenced that individual's judgments, referred to as their "judgment policy".

Statistical judgment models produced by policy capturing studies have been found to differ substantially from, and predict legal decision-makers' judgments better than, those individuals' self-reported judgment policies (e.g., Dhimi, 2003; Dhimi & Ayton, 2001; Klaas, Mahoney, & Wheeler, 2006; Konečni & Ebbesen, 1982, 1984; Sensibaugh & Allgeier, 1996; von Helversen & Rieskamp, 2009; York, 1992). Additionally, unlike traditional "nomothetic" experimental design, which involves generalising results across groups of individuals, policy capturing analyses data on a person-by-person or 'idiographic' basis. The idiographic approach is a powerful research tool, since it provides much richer data on the judgments made by a sample of individuals than can be obtained aggregated group data. As well as evaluating each individual's unique judgment policy, it is also possible to measure the level of agreement or disagreement between different individuals' judgment policies. This is particularly useful in a domain such as sentencing where individuals' judgments have been found to vary widely. Additionally, an idiographic approach allows for comparisons between people's statistically derived judgment policies and their explicit self-reports (which can be collected separately). Lastly, in the sentencing domain, idiographic studies can have more impact since they allow researchers to report on sentencing practice judge-by-judge, rather than aggregated across a whole jurisdiction or court district (Dhimi & Belton, 2017).

Social judgment theory research typically (but not necessarily – See Dhimi & Ayton, 2001) uses linear regression models to estimate individuals' judgment policies (Cooksey, 1996). Regression analysis is also the standard approach used in the (nomothetic) study of sentencing factors (e.g., Anderson & Spohn, 2010; Feldmeyer & Ulmer, 2011; Pina-Sánchez & Linacre, 2013; Ulmer & Johnson, 2004). Regression models are highly unlikely to be

“isomorphic” representations of human judgment (i.e., actually representing what goes on in the decision-maker’s brain – Hoffman, 1960). Further, it has been argued that linear models are psychologically implausible (e.g., Dhimi & Harries, 2001; Gigerenzer & Goldstein, 1996). The complex calculations involved in weighting and integrating multiple items of information quickly “grow unfeasibly large” for human processing (Todd & Gigerenzer, 2000, p. 728), given the limited computational capacity of the human brain (Simon, 1956). Researchers therefore propose that simple, “fast and frugal heuristics” (described at p. 14 above), which use relatively little cognitive effort, are a more plausible description of human judgment. Another criticism of regression modelling is that it is static, in the sense that it assumes people weight and use cues in the same way for every case that they encounter (Dhimi & Harries, 2001; Harvey, 2001).

However, recent work by Glöckner and others (e.g., Glöckner & Betsch, 2008a, 2008b, 2012; Glöckner, Hilbig, & Jekel, 2014; Glöckner & Hodges, 2011) suggests that human information-processing capacity may be greater than previously thought. People may actually be able to integrate multiple cues intuitively through a system of rapid, complex, compensatory parallel processing. If Glöckner and colleagues are correct, weighted additive models may not be so implausible after all. There have also been questions raised about the plausibility of fast and frugal models (e.g., Dougherty, Franco-Watkins, & Thomas, 2008; Glöckner & Betsch, 2008a, 2008b). Newell (2005) makes the point that fast and frugal heuristics’ plausibility advantage based on frugality of information use only applies in a serial cognitive architecture, whereas a parallel architecture (such as those used in Glöckner and Betsch’s 2008a model) breaks the link between amount of information used and decision speed (see also Bröder & Newell, 2008).

In any case, using a statistical model to analyse human judgment which does not isomorphically represent that judgment is not necessarily a problem; the problem is treating it

as if it *were* isomorphic. A linear regression model can be useful on a “paramorphic” basis (Hoffman, 1960), i.e., to the extent that it can predict the outcome of a person’s judgment process based on a specified set of inputs, despite not capturing the process itself (Harte & Koele, 2001). It is proposed that this is sufficient to achieve the ultimate goal of the present research, which is to understand more about the importance of PMFs in sentencing, rather than learning about the inner mechanics of human judgment per se.

A limitation of experimental designs is the lack of external validity. Experimental studies often involve students making judgments on simplified, hypothetical scenarios in controlled laboratory conditions. Consequently, the findings may not be generalisable to judgments made in the outside world, such as those made by judges and magistrates in real court cases (e.g., Berkeley & Humphries, 1982; Condlin, 2010; Dhami & Belton, 2017; Mitchell, 2002)⁵.

1.5. Past Research on the Role of PMFs in Sentencing

The following two sections summarise the research to date on sentencers’ use of PMFs in sentencing and public judgments about PMFs in sentencing, respectively.

1.5.1. Research on Sentencers’ Use of PMFs

Despite playing an important role in sentencing outcomes, personal mitigation is currently under-researched and very little is known about sentencers’ use of PMFs in practice (Ashworth, 2015; Bagaric, 2014; Roberts, 2011). The majority of sentencing studies, in England and Wales and abroad, have been focused on the impact on sentencing outcomes of extra-legal factors such as offender race or gender. In addition, the findings on PMFs that do exist are predominantly from studies that have used courtroom observation, interviews with

⁵ Such experimental studies are also easy for sentencers to dismiss as not being applicable to them (Dhami & Belton, 2017).

sentencers, and/or questionnaires. As discussed above, these research methods have significant limitations. The following section reviews the limited research that has been carried out in England and Wales to date. Except where specified, the studies did not distinguish PMFs from other mitigating factors, although the majority of mitigating factors studied were, in fact, PMFs.

In an early study, Shapland (1981) observed and transcribed 126 speeches in mitigation made by defence counsel across 30 Crown Court and 70 magistrates' court cases in a range of Greater London locations. It was found that defence counsel mentioned a huge array of different mitigating factors in their speeches: 229 different mitigating factors across 876 mitigating factor mentions. In Crown Courts, five mitigating factors were mentioned more than 10 times: minor role in the offence (17 mentions), minor offence of its type (12 mentions), co-operated with police (12 mentions), kept out of trouble since last conviction (11 mentions), and has job/good job (10 mentions). In magistrates' courts, eight factors were mentioned more than 10 times: has job/good job (18 mentions), good work record (15 mentions), apologised (15 mentions), settled relationship with family (14 mentions), no previous convictions (13 mentions), drunk (11 mentions), co-operated with police (10 mentions), and in financial difficulties (10 mentions). Shapland's study was, however, purely descriptive; her research methodology did not allow her to explore the relationships between mitigating factors and different sentencing outcomes.

Gelsthorpe and Loucks (1997) interviewed 189 magistrates (nine groups and 35 individuals) about their approach to sentencing and analysed the interviews qualitatively (the precise form of analysis used was not specified). The researchers noted that every group/individual apart from one agreed that remorse was an important mitigating factor but their analysis was more focused on how magistrates assessed whether an offender's remorse

was genuine or not. Other analysis of mitigation was limited to the influence of family circumstances such as dependent children and stability of employment/income.

Flood-Page and Mackie (1998) examined the records of 3,000 cases from 25 magistrates' courts and 1,800 from 18 Crown Courts, supplemented with courtroom observations. As part of their study, they compared the overall percentage of Crown Court offenders sentenced to immediate custody (57%) with cases involving various aggravating or mitigating factors. The most influential mitigating factors identified were provocation (42%), minor role in the offence (43%) and mental illness (51%). For violent offences (overall 59%), minor injury to victim had the most impact (40%), followed by employed (47%) and previous good character (53%). For burglary (overall 67%), the most significant factor was first offender (31%), then on bail prior to sentencing (48%) and financial problems (57%). For suspended custodial sentences, the authors noted the reasons given for suspending the sentence. Most common was physical/mental illness (14 cases), then looking after dependent relative (12), previous good character (12), personal difficulties/stress (2) and remorse/change in lifestyle (2). The likelihood of a community sentence (33% overall) was increased by youth (38%), mental illness (37%), and spontaneity (46%). Unfortunately, Flood-Page and Mackie's study design made no allowance for co-occurring factors or interactions between factors, and the value of their findings is substantially diminished as a result.

Davies & Tyrer (2003) investigated judges' attitudes to sentencing burglars. Fifty-one Crown Court judges were each given five hypothetical cases of domestic burglary. The judges had to decide an appropriate sentence for each scenario and explain their reasoning. The results were then analysed qualitatively. One of the scenarios included personal mitigation: an offender who was the sole provider for his children and terminally ill wife. All but one judges stated that although domestic burglary typically attracted a custodial sentence, the mitigating circumstances would make a non-custodial sentence likely. However, there

was much more variation in the sentences given for this scenario than the other three scenarios, with different judges proposing 12-24 months' probation, curfew orders or between 60 and 200 hours of community service.

Hough, Jacobson and Millie (2003) explored the factors that sentencers considered determine whether an offender is given a custodial sentence or not. The authors conducted focus groups with 80 magistrates, followed up with questionnaires, and one-to-one interviews with 48 Crown Court sentencers and five members of the senior judiciary. Respondents were each asked to describe four cases they had sentenced that were on the cusp between custody and a community sentence. The factors cited most often were divided into six categories. Three categories exclusively contained PMFs. "Response to prosecution" covered remorse, a guilty plea, and co-operation with the authorities. "Condition of the offender" comprised motivation to address offending behaviour, treatable psychiatric problems, medical problems, and youth/old age. "Situation of the offender" comprised family responsibilities, family support, stable relationship, current employment or prospects, positive references, and accommodation. The other three categories appear to include both aggravating and mitigating factors: "criminal history", "nature of offence" and "other". This is frustrating as it is not possible to compare the number of PMFs and aggravating factors cited overall, nor to compare PMFs to other mitigating factors. The number of times factors from each category were cited across the 311 cases described by respondents is set out in Table 1.1 below. Chi-square tests on Hough et al.'s data confirm that all three categories of PMF were cited significantly more often in non-custodial cases than in custodial cases.

Table 1.2

Categories of aggravating and mitigating factor cited by sentencers in interview when describing sentenced cases that were on the cusp of custody. Adapted from Hough et al. (2003).

Factors	Non-custodial cases	Custodial cases
<i>PMF categories</i>		
Response to prosecution	61	27
Offender's situation	71	9
Offender's condition	73	9
<i>Categories including PMFs and aggravating factors</i>		
Criminal history	58	71
Nature of offence	39	91
Other	60	34

Speed and Burrows (2006) explored the influence of various aggravating and mitigating factors on sentence types received in cases of theft from shops. The authors' analysis was based on data collected from a sample of 1,563 Crown Prosecution Service files from 2003 to 2004 (1,433 from the magistrates' court and 130 from the Crown Court). Bivariate analysis of each factor was carried out, along with a multinomial logistic regression. The bivariate analysis found significant relationships between five mitigating factors and sentence type. Offenders in employment had a 15% lower chance of custody; offenders with a fixed abode had a 28% lower chance of custody; offenders on benefits had a 28% higher chance of a community sentence rather than other sentence types; offenders showing remorse had a 11% higher chance of a discharge and a 14% lower chance of custody; and offenders showing evidence of "self-treatment" (i.e., addressing addiction) had a 23% higher chance of receiving a community sentence rather than other sentence types. Previous good character was not found to have any significant association with sentence type. However, the multinomial logistic regression found that of the mitigating factors identified in the bivariate analysis, only two were significantly associated with sentence type. Offenders on benefits

were 3.88 times more likely to receive a community sentence rather than a discharge (i.e., an aggravating effect) but 3.57 times less likely to receive custody rather than a community sentence. Offenders with a fixed abode were 3.09 times less likely to receive custody rather than a discharge, and 2.26 times less likely to receive custody rather than a community sentence.

Jacobson and Hough (2007) explored sentencers' use of PMFs by observing 132 Crown Court cases across a wide range of offences, and interviewing 40 Crown Court sentencers. Sentencers mentioned PMFs in their reasons in 127 of the 132 observed cases. The most commonly mentioned PMFs were good character (mentioned 21 times), addressing drug/alcohol problems (mentioned 19 times), and youth (mentioned 19 times). Judges stated in court that mitigation had reduced the sentence from immediate custody to another sentence in 43 cases, with personal mitigation playing a major part in at least 38 of those cases. In 40 cases, of which 34 included personal mitigation, judges stated that mitigation other than a guilty plea resulted in a shorter custodial sentence.

In interview, Jacobson and Hough (2007) asked sentencers to rate the relative importance of various PMFs across three sentencing scenarios: an assault occasioning actual bodily harm (ABH), a burglary, and a death caused by dangerous driving. Each scenario included several mitigating factors, and the judges were asked to score the factors for the impact they should have on sentencing: either A (major impact), B (moderate impact) or C (no impact). Factors rated as having a moderate impact or higher for ABH were severe depression and profound regret; for burglary, motivation to get drug treatment; and for death by dangerous driving, support from the victim's family, intense remorse and married with three children.

Jacobson & Hough included different PMFs across the different offences, which limits the value of comparisons made across offences. The authors nevertheless collated the results and reported that severe depression, support of the victim's family and addressing addiction were most important to sentencers (out of 13 PMFs tested). Qualitative analysis of the interviews revealed that the judges were agreed about the importance of some PMFs, such as clinical depression at the time of the offence. However, their approaches to other factors were very inconsistent, including the impact of an offender's commitment to join a drug treatment programme and whether remorse is itself enough to merit mitigation unless additional steps were taken (e.g., attempting reparation).

Overall, the above studies tell us relatively little about the impact that different PMFs have on sentencing outcomes. Shapland (1981), Gelsthorpe and Loucks (1997), Hough, Jacobson and Millie (2003) and Jacobson and Hough (2007) all used research designs that do not allow conclusions to be drawn about the relationships between PMFs and sentences. Speed and Burrows' (2006) findings were limited to cases of shop theft but do raise questions given that their multivariate analysis found that several commonly occurring PMFs including remorse, good character, and addressing addiction had no significant effect on sentencers' choice of sentence.

Three recent studies have used statistical analysis of data from the Crown Court Sentencing Survey to explore sentencers' use of PMFs. Only a brief summary is provided here; the research is reviewed in detail in the introduction to Chapter 2 (pp. 62-67). Pina-Sanchez and Linacre (2013) explored the consistency of sentencers' use of aggravating and mitigating factors across Crown Court centres using 5,527 assault cases from the 2011 CCSS data. The authors examined three PMFs (remorse, sole/primary carer and no previous convictions) and six aggravating factors (previous convictions, gang membership, vulnerable

victim, public worker victim, being under the influence of drugs/alcohol, and sustained assault). All three PMFs were found to be significant predictors of a reduced sentence.

Maslen (2015a) used 5,405 cases of assault from the 2011 CCSS data to examine the extent to which remorse and previous convictions predicted whether an offender received a custodial or non-custodial sentence. Remorseful offenders were found to be exactly half as likely to go to prison as those who did not. Maslen also looked for an interaction between remorse and previous convictions, but did not find one.

Lastly, Irwin-Rogers and Perry (2015) used a sample of 4,645 domestic burglary cases from the 2012 CCSS data to explore the relationship between each of the 18 mitigating factors and 23 aggravating factors specified in the burglary guidelines (see Appendix 2) and sentence type/length. Irwin-Rogers and Perry found that 15 mitigating factors (including remorse, good character and addressing addiction) significantly predicted sentence category.

Unfortunately, all of the CCSS studies to date had substantial limitations. For example, Pina-Sanchez and Linacre (2013) and Maslen (2015a) only included a small number of sentencing factors in their analysis, while Irwin-Rogers and Perry (2015) did not control for offence seriousness. The studies also contain very little exploration of cases involving multiple co-occurring PMFs. A fuller critique of these studies is included at pages 62-67 of Chapter 2.

1.5.2. Research on character-based PMFs

The following section reviews empirical research to date in relation to the three character-based PMFs that are the subject of the present research, namely remorse, addressing addiction, and good character.

1.5.2.1. Remorse. The expression of remorse is a very well-recognised PMF in England and Wales; in the Crown Court in 2012, remorse was the most frequently applied PMF across eight out of the ten offence categories reported (and second-most frequent in the other two), applied in 31% of cases overall (Sentencing Council, 2013a). Shapland (1981) found that apology and/or other factors relating to remorse (e.g., realising one's actions were wrong, accepting responsibility for the offence, and appreciating the impact on the victim) were mentioned 63 times in 126 pleas in mitigation across Crown and magistrates' courts. Jacobson and Hough (2007) found that remorse was the seventh-equal most mentioned PMF across 132 Crown Court sentencing cases (nine mentions) and third-equal most mentioned in 40 sentencer interviews (13 mentions). In the Crown Court in 2014, domestic burglary cases involving remorse were associated with a custody rate of 59% (compared to the average of 77%) and an average custodial sentence length of three years (compared to the average of 3 years, one month – Sentencing Council, 2015a).

The 40 sentencers interviewed by Jacobson and Hough (2007) rated remorse fourth most important out of 13 PMFs tested. Maslen (2015a) found that remorseful assault offenders were exactly half as likely to go to prison as those who did not express remorse, while Irwin-Rogers and Perry (2015) found that sentencers choosing between a community sentence and a prison sentence for a case of domestic burglary were 1.32 times more likely to choose a community sentence for a remorseful offender. Conversely, Speed and Burrows' (2006) multivariate analysis of CPS data on theft from shops found no significant relationship between remorse and the type of sentence received. Rachlinski, Guthrie and Wistrich (2013) found that a group of 34 US federal judges were unaffected by an offender's apology, while the other judges tested (120 from Ohio, 81 from Canada, and 75 from an unidentified US jurisdiction) chose a shorter custodial sentence when the offender apologised for his actions.

Research suggests remorse is taken more seriously when it is demonstrated by actions rather than just words, such as a letter of apology to the court or efforts at reparation (Jacobson & Hough, 2007; Sentencing Advisory Panel, 2010). However, some academics argue that remorse should not be a PMF at all. Since minimum standards of human decency require offenders to be contrite when they break the law, displaying that contrition should not result in a reduced sentence (e.g., Bagaric, 2014; Bagaric & Amarasekara, 2002; Lippke, 2008; Tudor, 2008; for a full discussion of the arguments for and against remorse as a PMF, see Maslen, 2015b). There is also the related question of whether absence of remorse (or positive “defiance”) should be an aggravating factor, as is already the case in some jurisdictions (e.g., Delaware – see Delaware Sentencing Accountability Commission, 2016).

1.5.2.2. Addressing drug or alcohol addiction. Addressing addiction has been identified as an important factor, especially where property crime is committed to fund drug dependency. The offender must, however, show a genuine willingness to deal with his or her addiction, for example by participating in an appropriate rehabilitation programme (Jacobson & Hough, 2007; Padfield, 2011; Sentencing Advisory Panel, 2010; Shapland, 2011). Shapland (1981) found that factors related to addressing drug or alcohol addiction were mentioned 17 times in 126 pleas in mitigation across Crown and magistrates’ courts. In the Crown Court in 2012, addressing addiction was ranked amongst the five most common mitigating factors cited for three out of ten offence categories (burglary, drug offences, and arson and criminal damage) and was mentioned, on average, in 12% of cases across those categories (Sentencing Council, 2013a). Jacobson and Hough (2007) found that addressing addiction was the second-equal most mentioned PMF across 132 Crown Court sentencing cases (19 mentions) and the second most mentioned in 40 sentencer interviews (15 mentions).

In the Crown Court in 2014, domestic burglary cases involving addressing addiction were associated with a custody rate of 47% (compared to the average of 77%) and an average

custodial sentence length of two years, ten months (compared to the average of three years, one month – Sentencing Council, 2015a). However, Speed and Burrows’ (2006) multivariate analysis of CPS data on theft from shops found no significant relationship between addressing addiction and the type of sentence received. Jacobson and Hough (2007) did not gather any data on the relative importance to sentencers of addressing addiction, as it was not one of the 13 PMFs included in their sentencing scenarios.

Finally, there is some suggestion in the current England and Wales sentencing guidelines that the mitigating effect of addressing addiction should be limited to less serious offences. The burglary guideline (Sentencing Council, 2011b, p. 8) includes a comment that for addicts with “sufficient prospect of success, a community order with a drug rehabilitation requirement may be a proper alternative to a *short or moderate* custodial sentence” (italics added).

1.5.2.3. Good character. Good character is a very long-established mitigating factor in England and Wales (Crackanthorpe, 1902; Roberts, Padfield, & Harris, 2016). Shapland (1981) found 64 mentions of factors relating to positive good character (i.e., separate from lack of previous convictions) across 126 pleas in mitigation. In the Crown Court in 2012, good character or “offence out of character”⁶ was ranked amongst the five most common mitigating factors cited for eight out of ten offence categories and was mentioned, on average, in 20% of cases across those categories (Sentencing Council, 2013a). Jacobson and Hough (2007) found that good character was the PMF most frequently mentioned by sentencers across 132 Crown Court cases (21 mentions) and fifth most mentioned in 40 sentencer interviews (11 mentions). In the Crown Court in 2014, domestic burglary cases involving

⁶ The Sentencing Council’s data were collected using the Crown Court Sentencing Survey (CCSS). The CCSS used forms for each offence category that reflected the sentencing guidelines for that category. In 2012, only three offence categories had guidelines that included a specific mitigating factor of “good character/exemplary conduct”: assault, burglary and drug offences.

good character were associated with a custody rate of 27% (compared to the average of 77%) and an average custodial sentence length of two years (compared to the average of 3 years, one month) (Sentencing Council, 2015a). The closest PMF to good character tested by Jacobson and Hough (2007) was “respected individual”. The 40 sentencers interviewed rated “respected individual” ninth most important out of 13 PMFs tested.

Despite its common usage and apparent impact on sentence outcomes, good character is an “elusive and psychologically problematic” PMF (Freckelton, 2001, p.208). In the first place, it is not properly defined anywhere; Roberts (2008) notes that it is particularly in need of guidance, as it is unclear what sort of good behaviour should properly be taken into consideration, and to what extent. Roberts has a point: the terminology used to describe good character in England and Wales is at best unclear and at worst misleading. *Current Sentencing Practice* (Roberts, Padfield, & Harris, 2016), the standard practitioner textbook on sentencing, uses “previous good character” to mean a lack of previous convictions. A survey of 100 transcripts of Crown Court judges’ sentencing reasons that mention good character (Belton, 2017) found that judges also tend to use “previous good character”, “prior good character” and the expression “a man of good character” to refer to someone with no previous convictions (70% of all references to good character in the transcripts).

However, the Sentencing Advisory Council (2010) used the term “positive good character” to refer to contributions to the community such as through charitable work, and selfless acts of bravery or service. The PMF “good character/exemplary conduct” is listed in the current sentencing guidelines (e.g., Sentencing Council, 2011a, 2011b) as a separate Step Two PMF from “no previous convictions”. The sexual offences guideline (Sentencing Council, 2013c) states explicitly that “previous good character/exemplary conduct is different from having no previous convictions” (without giving any further details). Meanwhile, *Current Sentencing Practice* (Roberts, Padfield, & Harris, 2016) describes this kind of

positive behaviour as “meritorious conduct wholly unrelated to the case”. Perhaps unsurprisingly, judges appear confused. The Sentencing Council’s research into sentencing sexual offences found that some judges “felt previous good character and no previous convictions were interchangeable, potentially encouraging double counting” (Sentencing Council, 2013b, p. 11). Several of the judges interviewed in Study 2 in this thesis also appeared unclear about the relationship between good character in the sense of positive good character, and good character in the sense of no previous convictions – see Chapter 3, pp. 145-146.

Another issue surrounds the examples of positive good character used in the sentencing literature. Sentencing textbooks and articles typically focus on “meritorious conduct”, exceptional one-off acts such as saving a drowning child, and rarely refer to public service such as charitable acts (e.g., Banks & Harris, 2012; Roberts, Padfield, & Harris, 2016). Yet Study 2’s interviews with judges (see Chapter 3, pp. 145-147 below) and the present author’s review of judges’ sentencing reasons (Belton, 2017) suggest that the everyday “bread and butter” of good character is character testimonials from family, friends, employers, community leaders, and so on. These testimonials deal with a broad range of character-related issues including public service but also matters such as trustworthiness and reliability as a worker or partner, caring responsibilities, and status within the community. There is no discussion anywhere in the published literature or reported cases about the level of influence that this kind of everyday good character evidence has, or ought to have, on sentencing judgments.

Finally, many sentencing commentators have criticised mitigation based on good character as “social accounting” (Ashworth, 2010, 2015; Von Hirsch, 2011), “character retributivism” (Murphy, 2006), or “intrusive moral policing” (Maslen & Roberts, 2013), which they argue should have no place in sentencing since it undermines the fundamental

principle of proportionality. In England and Wales, the sentencing guideline for sexual offences downplays the importance of good character as a PMF, stating that “[t]he more serious the offence, the less the weight which should normally be attributed to this factor” (Sentencing Council, 2013c, p. 11). In addition, for certain serious sexual offences including rape, the guideline specifies that “previous good character/ exemplary conduct should not normally be given any significant weight and will not normally justify a reduction” (Sentencing Council, 2013c, p. 11).

1.5.3. Research on Public Judgments about PMFs

Previous research suggests that the public in England and Wales may not prioritise the same PMFs as those emphasised by sentencers. Russell and Morgan (2001) explored public opinion of sentencing for domestic burglary using face-to-face interviews with 795 members of the public, 12 follow-up interviews, and two group discussions. The mitigating factors most often mentioned without prompting were all PMFs: first offence (22% of respondents), mentally ill (15%), financial hardship (11%), and youth (9%). Forty-four percent of those asked said there were no mitigating factors or could not think of any (versus 6% who could not think of any aggravating factors). When prompted with 11 mitigating factors, mentally ill was the PMF rated most important by the most respondents (44%), followed by previous good character (19%), young person playing a minor role (8%) and financial hardship (4%). Results for the other factors are not given. The mitigating factors most likely to be judged irrelevant were drunk/high at the time of the offence (40%), trying to support drug/alcohol dependency (40%), and female (20% - it is interesting that 80% considered this relevant, given that it is an extra-legal factor). The authors also asked respondents to choose a sentence for three scenarios involving combinations of aggravating and mitigating factors. However, the factors were not arranged orthogonally across the scenarios and so no valid

conclusions can be drawn about the independent effect of any mitigating factors or about interactions between factors.

Clarke, Moran-Ellis and Sleney's (2002) study of public attitudes to rape involved qualitative analysis of 28 focus group discussions (5-9 people per group) and 62 face-to-face individual interviews with 37 members of the public and 25 rape survivors. "Very few" respondents felt that any factors should mitigate rape (Clarke et al., 2002, p. 55). The principle of reducing sentence for a guilty plea was acknowledged, but there was a strong view that it was counter-productive since it gave offenders an opportunity to "play the system" (Clarke et al., 2002, p. 56). The only other mitigating factors mentioned were mental illness and learning disability.

Hough, Roberts, Jacobson, Bredee and Moon (2008) examined public attitudes to sentencing for causing death by driving. The authors carried out 12 focus groups with a total of 101 participants, 11 interviews with victims' relatives, and a survey of 1,031 people. Each survey participant read 10 scenarios of causing death by driving with different combinations of aggravating and mitigating factors present and was asked to choose an appropriate sentence (in months). Participants were also asked to identify which of a list of 10 mitigating factors (seven of which were PMFs) should reduce a sentence.

Survey data was first analysed using conjoint analysis⁷ in order to test the relative influence of 10 aggravating and six mitigating factors on survey respondents' choice of custodial sentence length. Four of the six mitigating factors were PMFs: offender helped victim and called emergency services, remorse, experienced driver, and inexperienced driver. The other two mitigating factors tested were offender badly injured in the crash and victim's

⁷ Conjoint analysis is a statistical technique commonly used in marketing research to examine consumer preferences for a product or service with different combinations of attributes/features. Each participant is only shown a few of the possible combinations of items, and different combinations are shown to different participants, varied systematically across the sample. The relative effect of each attribute/feature on participants' preferences is then estimated statistically.

parents asked court for leniency. Overall, the aggravating factors had a greater impact (a mean difference of +5.4 months) than the mitigating factors (a mean difference of -1.8 months). The three mitigating factors that reduced participants' choice of sentence length by the greatest amount were offender helped victim and called emergency services (- 4 months), remorse (-3 months), and inexperienced driver (-2 months).

Hough et al. (2008) state that they also asked participants directly about which factors should reduce a sentence "in order to see whether this alternate methodology would yield very different results" (p. 38). However, all of the mitigating factors used in the self-report study were different from those used in the conjoint analysis – precluding any meaningful comparison between the two studies. In the self-reports, the three most commonly chosen PMFs were no previous driving convictions (37%), previous good character (35%⁸), and sole carer for others (31%). 16% of participants thought none of the factors should mitigate the offence.

Qualitative analysis of data from the focus groups revealed that participants gave little weight to any mitigation for causing death by driving. Remorse, in particular, was viewed as unimportant because it is a reaction that the offender ought to have in any case, and there was scepticism about the sincerity of remorse expressed in court. The 11 relatives interviewed were particularly sceptical about remorse – several saying that offenders "pretended" in order to get a reduced sentence – and objected to mitigation in general on the grounds that factors such as youth or a guilty plea did not alter the seriousness of what the offender had done.

Hough, Roberts, Jacobson, Steele and Moon's (2009) research is the only study to date that has focused exclusively on the role of PMFs in sentencing. The study surveyed

⁸ This was included as a separate mitigating factor from no previous convictions, even though Hough et al. define good character as "an offender with no previous misconduct" (Hough et al., 2008, p. 45), i.e., equivalent to no previous convictions. As discussed at pp. 48-50, this is typical of the confusion that surrounds the meaning of good character as a PMF.

1,023 members of the public and held eight focus groups, involving a total of 69 people. Survey respondents were asked to rate the importance of 13 mitigating factors, namely crime committed in an emergency, no prior convictions, minor role in the crime, remorse, assisting police, medical condition, led on by others, treated for depression, elderly, abused as a child, main carer of elderly relative, single parent, and youth. Of those, 11 were PMFs but two of them (crime committed in an emergency and minor role in crime) relate to the characteristics of the offence rather than the offender. Hough et al. found that the three PMFs rated as most important (out of 11) were no prior convictions, remorse, and assisting the police/authorities (the findings are also reported in Roberts, Hough, Jacobson, & Moon, 2009, Roberts & Hough, 2011, and Roberts & Hough, 2014).

Hough et al. (2009) also carried out a conjoint analysis to estimate the influence of various aggravating factors and PMFs on people's choice of custody or not. Each participant was asked to choose a sentence for two versions of two hypothetical property offences and two versions of two violent offences (eight scenarios in total). The presence of six PMFs was varied across the scenarios, with different participants seeing different PMF combinations⁹. Unfortunately, the authors used a different set of aggravating factors and PMFs for the property offences and the violent offences, so comparison across offence types was not possible. For the property offences, reparation was the PMF that had the strongest mitigating effect, followed by addressing drug addiction, being in debt, a history of abuse, and then family pressure. For the violent offences, the PMFs remorse, mental illness, and the risk of losing a job all had the same effect, and they were all more influential than a history of abuse. Hough and colleagues (2009) also used their conjoint analysis to test for interactions between PMFs and aggravating factors, i.e., whether the effect of one PMF or aggravating factor was influenced by the presence of another PMF or aggravating factor. The authors found no

⁹ For a description of conjoint analysis, see footnote 7 above.

interactions between factors. They concluded that “the public have a simpler model of sentencing [than sentencers], one which does not necessarily consider Factor X in light of Factor Y” (Hough et al., 2009, p. 49).

Lastly, Hough et al. carried out a qualitative analysis of the focus group data. Participants were asked to choose a sentence for an offender in two vignettes, a burglary and an assault. They were then asked to comment on the relevance of a set of 13 mitigating factors (all of them PMFs): single parent, voluntarily paid compensation, ‘genuine’ remorse, treated for depression, employed/will lose job, learning disabilities, under pressure from uncle, in drug treatment, youth, severely abused as a child, elderly, chronic physical illness, and in considerable debt. Why a slightly different set of mitigating factors and some different wording were used for the focus groups than for the survey is not stated, but it is unhelpful for making comparisons between the two elements of the study. The focus group analysis was collated across the two vignettes and the 13 PMFs were grouped into four factors given “high” significance by participants (single parent, treated for depression, youth), four given “moderate” significance (genuine remorse, under pressure from uncle, in drug treatment, and abused as a child), and five given “low” significance (elderly, chronic physical illness, employed/will lose job, in debt, and voluntarily paid compensation). Remorse and continuing drug treatment were both given “moderate” significance. In addition, the focus groups revealed that while all participants believed that at least some of the PMFs should have an impact on sentencing, there was wide variation in how participants perceived the PMFs.

Hough et al.’s (2009) study was ground-breaking research but did have several limitations. These are discussed in detail below given the study’s exclusive emphasis on PMFs in sentencing. First, the authors did not report any tests of statistical significance or any other way of assessing whether the results are generalizable to the wider population (e.g., confidence intervals). Second, the conjoint analysis used different PMFs across the two

offence types. Third, the authors did not provide sufficient information about the conjoint analysis to properly evaluate its design. In particular, it is difficult to see given the small number of PMF and/or aggravating factor combinations shown to each participant (eight out of a possible 256) how interactions between sentencing factors could be estimated reliably¹⁰.

Fourth, the study did not provide any useful comparative evidence on the character-based PMFs that are the subject of the present study. Remorse was found to be a substantial PMF in all three elements of Hough et al.'s study (the survey, the focus groups, and the conjoint analysis). However, addressing addiction was only included in the focus groups, where it was put in the "medium" category along with remorse, and in the conjoint analysis, where it was tested in relation to property offences, while remorse was tested in relation to violent offences. Good character was not included in the study at all. Therefore, no comparison between the character-based PMFs is possible based on Hough et al.'s findings. The omission of good character is perhaps surprising given it has been identified as a particularly ill-defined and problematic PMF (e.g., Maslen & Roberts, 2013; Murphy, 2006; Roberts, 2008). Finally, the criteria for including PMFs and aggravating factors was not specified and two of the three most commonly occurring aggravating factors, namely previous convictions and under the influence (based on Sentencing Council, 2014), were also excluded from the study.

McNaughton Nicholls, Mitchell, Simpson, Webster and Hester (2012) explored people's views on aggravating and mitigating factors in the context of sexual offences through qualitative analysis of 12 focus groups with 82 members of the public and interviews with 46 sexual offence victims. Focus group participants and victim/survivors were generally

¹⁰ Fractional factorial designs that use only a small fraction of the full factorial design (i.e., every combination of every variable) do not have the power to estimate interactions between variables. It is not clear from Hough et al.'s paper how many combinations of factors were used across all participants, since they state that each participant was shown a different eight combinations of variables. It is therefore unclear whether their design actually had the ability to identify interactions between variables.

unable or unwilling to acknowledge clear factors that would mitigate a sexual offence, even where PMFs were explicitly suggested to them. The only PMF participants accepted should definitely result in a reduced sentence was mental health issues/learning difficulties. There was little support for a guilty plea reduction, and young age, offender having received abuse (with limited exceptions), and good character were all rejected as PMFs. Overall, aggravating factors were viewed as more important than mitigating factors, and participants felt that no amount of mitigation should reduce an offender's sentence below a specified minimum.

In summary, past research on public attitudes to PMFs suggests that the public may prioritise widely varying PMFs across different offence types. There is also some evidence, particularly from the qualitative studies, of a lack of public enthusiasm for PMFs in general. However, studies to date have examined very varied combinations of PMFs, making it extremely hard to draw any overall conclusions. There is also evidence that different research methods may produce different results – for example, Hough and colleagues' (2008, 2009) conjoint analyses both found that remorse had a substantial mitigating effect, while their and others' qualitative findings suggest only limited support for remorse and widespread scepticism about the authenticity of offenders' apologies. In addition, most of the studies used interviews and/or self-report surveys to gather data on sentencing judgments. This approach creates problems which were discussed at pp. 31-32 above.

1.6. The Present Research

1.6.1. Research Aims and Rationale

The primary aim of the present research was to learn more about the role that PMFs play in criminal sentencing judgments. To what extent are sentencers influenced by considerations such as an offender making an apology, or having lived a previously virtuous,

constructive life? This primary aim was advanced by focusing on three centrally important character-based PMFs, namely, remorse, good character, and addressing addiction.

There were also three secondary aims. The first was to examine empirically how sentencers use character-based PMFs in their sentencing judgments. The second was to explore public judgments about the role of character-based PMFs in sentencing. The third was to compare sentencers' use of character-based PMFs with public judgments about those PMFs. Each of the four studies contained in the thesis also had a set of objectives, which are listed at the beginning of the chapters dealing with those studies.

The primary rationale for the present research was to inform the development of future guidance and/or other decision support for sentencers on the use of PMFs in sentencing. It has been argued that discretionary sentencing encourages intuitive judgment, which in turn leads to inconsistency, bias, and lack of transparency. The alternative is to have more structured sentencing that encourages or requires more analytical judgment. Critics of structured sentencing argue that it prevents properly individualised sentencing. However, recent research suggests that for most offenders, individualised sentencing may be a myth in any case. Consequently, structured sentencing can potentially offer reduced inconsistency and bias, while also producing *more* individualised sentences than are typically handed down in discretionary sentencing systems.

In order to produce guidance regarding the use of PMFs, however, evidence is needed of how sentencers currently use PMFs in sentencing, including the relative importance they give to different factors and whether the presence of one factor affects the impact of another factor. Public judgments about sentencing fairness are also an important part of the sentencing process. Public support for sentencing is required to maintain the legitimacy of the criminal justice system (amongst other things). Research on both sentencers' use of PMFs

and public judgments about PMFs is currently sorely lacking, and as discussed above, most of the research to date has been limited in one way or another.

This thesis combined statistical analysis of real-life sentencing decisions and experimental studies on individuals' sentencing judgments to analyse the relative importance of different PMFs to sentencers and the public, and whether the co-occurrence of PMFs affects their impact on sentencing outcomes. Qualitative analysis of sentencers' perceptions regarding PMFs was used to explore questions raised by the statistical analysis and identify areas where further research may be needed to understand the process of personal mitigation more fully.

It is hoped that the present research findings can be used to assess the strengths and weaknesses of current sentencing practice in relation to PMFs, including whether it is in line with public judgments about the proper role of PMFs in sentencing. That knowledge can, in turn, contribute to the development of evidence-based guidance on the use of PMFs in England and Wales sentencing practice, and inform sentencing in other jurisdictions.

1.6.2. Structure of This Thesis

The research in this thesis comprises four studies. Study 1 (Chapter 2) explored sentencers' use of character-based PMFs in their judgments, using statistical analysis of CCSS data. Study 2 (Chapter 3) was a qualitative analysis of sentencers' perceptions about PMFs, designed to explore the findings of Study 1 further and generate ideas for further research. Study 3 (Chapter 4) used an experimental design to measure public judgments about PMFs in sentencing. Study 4 (Chapter 5) used an idiographic experimental design to examine public judgments about PMFs in more detail, in particular to explore the variation between individuals' judgments. The methodological and practical implications of the present research findings are discussed in Chapter 6, along with proposals for future research.

2. Study 1

Personal mitigation in practice: An analysis of data from the Crown Court

Sentencing Survey

2.1. Introduction

It was argued in Chapter 1 that guidelines and/or a more structured approach to personal mitigation are needed in order to improve sentencing consistency and transparency, while reducing the likelihood of bias. It was proposed that guidelines need not prevent individualised sentencing and could, in fact, produce a more individualised approach to personal mitigation than that generated by the current discretionary regime. Developing guidelines requires empirical data on sentencers' use of PMFs in sentencing so that policy-makers can determine whether PMFs are being used in a way that is consistent with current sentencing principles and policy.

Sentencing statistics suggest that the presence of PMFs reduces both the likelihood of an offender receiving an immediate custodial sentence and the average custodial sentence length (Sentencing Council, 2012, 2013a, 2014, 2015a). However, as the Sentencing Council itself acknowledges, the figures in its reports are descriptive statistics that simply report the percentage of cases where a particular PMF is present that result in a custodial sentence, and the length of that sentence. They do not account for the fact that PMFs' effects may in part be the product of their co-occurrence with other PMFs and/or AFs, and so they are potentially misleading.

There has been very little past empirical research on sentencers' use of PMFs. The research to date is reviewed in detail in Chapter 1, pp. 38-50. As discussed in Chapter 1, most

studies to date (e.g., Gelsthorpe & Loucks, 1997; Hough et al., 2003; Jacobson & Hough, 2007; Shapland, 1981) have been methodologically limited in their ability to reach any firm conclusions about relationships between PMFs and sentencing outcomes. Specific findings in relation to the three character-based PMFs that are the focus of this thesis (remorse, good character, and addressing addiction) are summarised in Chapter 1, pp. 45-50.

2.1.1. The Crown Court Sentencing Survey

The Crown Court Sentencing Survey (CCSS) was designed by the Sentencing Council to obtain data on the factors used by the court when deciding a sentence. The CCSS started in October 2010 and ran until March 2015. It used brief forms to collect information from judges on cases sentenced in the Crown Court in England and Wales. A different CCSS form was produced for each of several offence categories. In some cases, the category covered by the form was equivalent to the group of offences covered by a particular guideline, but this was not always the case. For example, the burglary form was used for aggravated burglary, domestic burglary, and non-domestic burglary. These are the three offences included in the burglary guideline (Sentencing Council, 2011b). However, the assault and public order form covered all of the assault offences included in the assault guideline (Sentencing Council, 2011a) and also public order offences such as harassment and affray, for which there are currently no guidelines.

Copies of the CCSS forms for assault and public order offences and burglary offences are in Appendix 3. The categories of offence covered by the CCSS forms issued to the courts were as follows: arson and criminal damage, assault and public order, burglary, driving offences, drug offences, offences causing death, robbery and assault with intent to rob, sexual offences (except indecent photographs of children), indecent photographs of children, theft/dishonesty/fraud, and other offences.

The CCSS form for each category of offence contains a list of mitigating and aggravating factors taken from the sentencing guideline relevant to that offence category (see Appendix 3). After sentencing a case, judges used the appropriate form to record which of the sentencing factors specified in the relevant guideline were taken into account in determining the offender's sentence.

The CCSS has some limitations. First, its completion was not mandatory and the average response rate was approximately 60%. Therefore, the CCSS data may only reflect the behaviour of judges who, for example, had a relatively positive view of the Sentencing Council and the sentencing guidelines, or simply had lighter caseloads and therefore time to complete the forms.

Second, fewer than 10 percent of the sentences in England and Wales each year are passed in the Crown Court; the remainder are made in magistrates' courts. This means the picture of sentencing provided by the CCSS is only generalizable to the Crown Court, although these do deal with the more serious and complex cases. Unfortunately there are currently no sentencing data available for magistrates' courts of the kind found in the CCSS.

Third, the lists of mitigating and aggravating factors set out in the guidelines (and hence forms) are non-exhaustive: the court can in theory take account of any other factors it considers relevant to a given case and, if it does so, they will not be recorded in the CCSS form. There is currently no way of knowing how often factors other than those specified in the guidelines are used by judges in practice, and no past research has explored this issue. Despite these limitations, CCSS has nevertheless generated huge and detailed datasets of real sentencing cases that enable useful in-depth analysis of Crown Court sentencing practice.

2.1.2. Past Research on Mitigating Factors using CCSS Data

The Sentencing Council produced annual sentencing reports based on CCSS data for the years 2011-2014 (Sentencing Council, 2012, 2013a, 2014, 2015a). The reports for 2013 and 2014 included breakdowns of custody rate and average custodial sentence length associated with the seven most commonly occurring mitigating factors in cases of domestic burglary (Sentencing Council, 2014, 2015a). The results are set out in Table 2.1 below.

Table 2.1

Custody rates and average custodial sentence length associated with each mitigating factor occurring in more than 2% of cases of domestic burglary in England and Wales in 2013 and 2014.

<i>PMF</i>	2013			2014		
	Prevalence (%)	Custody rate (%)*	ACSL** (Months)	Prevalence (%)	Custody rate (%)*	ACSL** (Months)
Good character	4	32	25	3	27	24
No previous convictions	9	38	23	8	31	27
Subordinate in group	N/A	N/A	N/A	5	40	30
Mental disorder	2	45	28	2	41	33
Addressing addiction	9	47	35	9	47	34
Age/lack of maturity	8	55	28	7	51	28
Remorse	22	60	34	21	59	30

*The overall custody rate in both 2013 and 2014 was 77%.

**Average Custodial Sentence Length. The ACSL in 2013 was 36 months; in 2014 it was 37 months.

Table 2.1 suggests that good character has the greatest mitigating effect of any PMF on custody rate in both 2013 and 2014 and on custodial sentence length in 2014 (second in 2013), while remorse has the least effect. However, the Sentencing Council statistics are

purely descriptive, and do not allow for possible correlations and/or interactions between multiple mitigating and aggravating factors. In practice, mitigating factors frequently co-occur with other mitigating factors (in 2014, 34% of Crown Court cases involved two or more mitigating factors – Sentencing Council, 2015a) and it is likely that they also co-occur frequently with aggravating factors. In order to address these limitations, the following studies all used some form of multivariate statistical analysis to take account of inter-correlations and interactions between factors.

Pina-Sánchez and Linacre (2013) used regression modelling to examine whether the use of various mitigating and aggravating factors specified in the sentencing guidelines for assault varied between Crown Court centres. Pina-Sánchez and Linacre's study used a sample of 5,527 cases of Actual Bodily Harm (ABH), Grievous Bodily Harm (GBH) and GBH with intent from the 2011 CCSS dataset. New sentencing guidelines for assault were introduced during 2011. (The changes made to the assault guidelines in 2011 are explained further below). As a result of inconsistencies between the old and new guidelines, Pina-Sánchez and Linacre only included three out of 17 possible mitigating factors in their regression model (although all were PMFS: remorse, primary/sole carer, and no previous convictions). Six aggravating factors were also included, out of a possible 31 (i.e., previous convictions, gang membership, vulnerable victim, victim was a public worker, offender was under the influence of alcohol/drugs, and sustained assault). A preliminary regression analysis found that all of the mitigating and aggravating factors tested significantly predicted custodial sentence length in the expected direction. The three mitigating factors were associated with a reduced sentence length and with two exceptions (gang membership and public worker victim) the aggravating factors were associated with an increased sentence length. Gang membership was non-significant and public worker victim actually had a mitigating effect.

Unfortunately, Pina-Sánchez and Linacre's focus was on assessing whether factors were used consistently across different courts, rather than on the weight given to one factor or another. Their findings about the relative strength of the mitigating and aggravating factors tested are substantially limited by their failure to control for all the other mitigating and aggravating factors that can be present in assault cases alongside the chosen factors. Pina-Sánchez and Linacre also did not examine any interactions between factors.

Maslen (2015a) used 5,405 cases from the 2011 CCSS data of offenders sentenced for an assault offence to explore the effects of remorse and previous convictions on sentence outcomes. Maslen conducted a binary logistic regression analysis with the following predictor variables: remorse, number of previous convictions, number of other aggravating factors (excluding previous convictions) and number of other mitigating factors (excluding remorse). In other words, Maslen did not control fully for the individual effects on sentence outcomes of mitigating and aggravating factors other than remorse and previous convictions. The outcome variable was whether an offender received a custodial or non-custodial sentence. Maslen found that both remorse and previous convictions were significant predictors. Remorse had an odds ratio of 0.50 (i.e., remorseful offenders were half as likely to go to prison), and previous convictions had an odds ratio of 1.24 (i.e., offenders with previous convictions were 1.24 times more likely to go to prison). Seriousness (odds ratio 1.79), number of aggravating factors (1.43), and number of mitigating factors (0.62) were also significant predictors of custodial sentence choice.

Maslen also explored whether there were any two-way interactions between remorse, previous convictions, and/or offence serious. There was no significant interaction between remorse and previous convictions but there were significant interactions between remorse and offence seriousness, and previous convictions and offence seriousness. As offence seriousness increased, the impact of both remorse and previous convictions on custodial

sentence likelihood gradually decreased to zero. Maslen's findings would be more persuasive if she had controlled separately for the effects of more sentencing factors.

Irwin-Rogers and Perry (2015) explored the impact of mitigating and aggravating factors on sentence outcomes using a sample of 4,645 cases of domestic burglary from the 2012 CCSS dataset. The authors carried out separate bivariate analyses for each of the 18 mitigating factors and 23 aggravating factors specified in the burglary guidelines followed by an ordinal logistic regression with all 41 factors as predictor variables. No attempt was made to control for offence seriousness. The outcome variable was sentence type/length, split into five categories. The original eleven categories of custodial sentence length recorded in the CCSS were collapsed to four in order to make the results of the ordinal logistic regression easier to interpret. In addition, non-custodial sentence was included as a category along with the custodial sentence length categories. This is a questionable approach to take because the decision whether to imprison is quite distinct from the choice of custodial sentence length, rather than being one point along some kind of ordinal scale from a fine to several years in prison.

Irwin-Rogers and Perry's regression model found that 30 factors (15 mitigating and 15 aggravating factors) significantly predicted sentence category. The study discussed the results for certain mitigating and aggravating factors but did not have any particular focus, and more emphasis was placed on descriptive statistics than the logistic regression results. The main aim appears to have been to illustrate the kind of information available in the CCSS data. Findings included that offence committed on impulse had a stronger mitigating effect on sentence category (odds ratio = 0.47) than remorse (0.76) or subordinate role in a group (0.57). Under the influence of alcohol/drugs – listed in the guidelines as an aggravating factor – was actually found to have a (statistically non-significant) mitigating effect (an odds ratio of 0.94), which the authors suggested may be because it is sometimes treated as a mitigating

factor. In addition to their failure to control for offence seriousness and lack of analytic focus as regards the mitigating and aggravating factors they chose to report in detail, Irwin-Rogers and Perry did not examine interactions between sentencing factors, and their study was limited to domestic burglary cases.

In summary, the studies based on statistical analysis of CCSS data have provided some insight into the relationships between PMFs and sentence outcomes. However, each of the studies above suffered from one or more limitations. All three studies were limited to a single offence category (or in the case of Irwin-Rogers and Perry, 2015, a single offence) – preventing any comparison of mitigating and aggravating factor use between offences. None of the studies included all three character-based PMFs. In addition, all three studies used CCSS data from only one year, whereas four years of data is now available. Pina-Sánchez and Linacre (2013) and Maslen (2015a) included only a small number of factors in their models, while Irwin-Rogers and Perry (2015) did not control for offence seriousness, and did not discuss findings for any PMFs other than remorse. Finally, only Maslen (2015a) investigated any interactions between factors.

2.1.3. Focus of the Present Study

The present study used data from the CCSS to investigate the role of PMFs in Crown Court sentencing judgments, and in particular the weight sentencers give to remorse, good character, and addressing addiction. In doing so, it also aimed to overcome the limitations of past CCSS research. First, the present study included all relevant PMFs and AFs in its analysis, while also controlling for offence seriousness. Second, it compared two offence types, assault and burglary (including non-domestic burglary, which has not been studied before). Third, it examined theoretically interesting interactions between PMFs. The present study also incorporated data from more than one year (i.e., 2011, 2012, and 2013). Using data

from multiple years gives a fuller overall picture of current sentencing practice than can be obtained from one year's data alone, since sentencing practice may vary from one year to another.

The primary focus of the present study was on sentencing factors that are included at step two of the new (post-2011) England and Wales sentencing guidelines (see e.g. Sentencing Council, 2011a, 2011b). Steps one and two of the guidelines sentencing process are illustrated in Figure 2.1 below. Step one factors are used to determine the seriousness of the offence on a scale of 1-3, with 1 being most serious. The seriousness score, in turn, determines the sentence starting point and range. Step two factors are then taken into account when deciding where the final sentence should fall within the chosen range. There are several further steps after step two that deal with issues such as guilty pleas and sentencing of multiple offences but they are excluded from Figure 2.1, for clarity. A more comprehensive flowchart of the whole sentencing process can be found in Dhimi (2013b). Almost all PMFs are listed in the guidelines as step two factors¹¹. The decision to focus on step two factors therefore reflects the primary aim of the study which is to learn more about the role of PMFs in real world sentencing decisions.

¹¹ The sole exception is “mental disorder or learning disability, where linked to the commission of the offence”, which is listed under “factors indicating lower culpability” in step one.

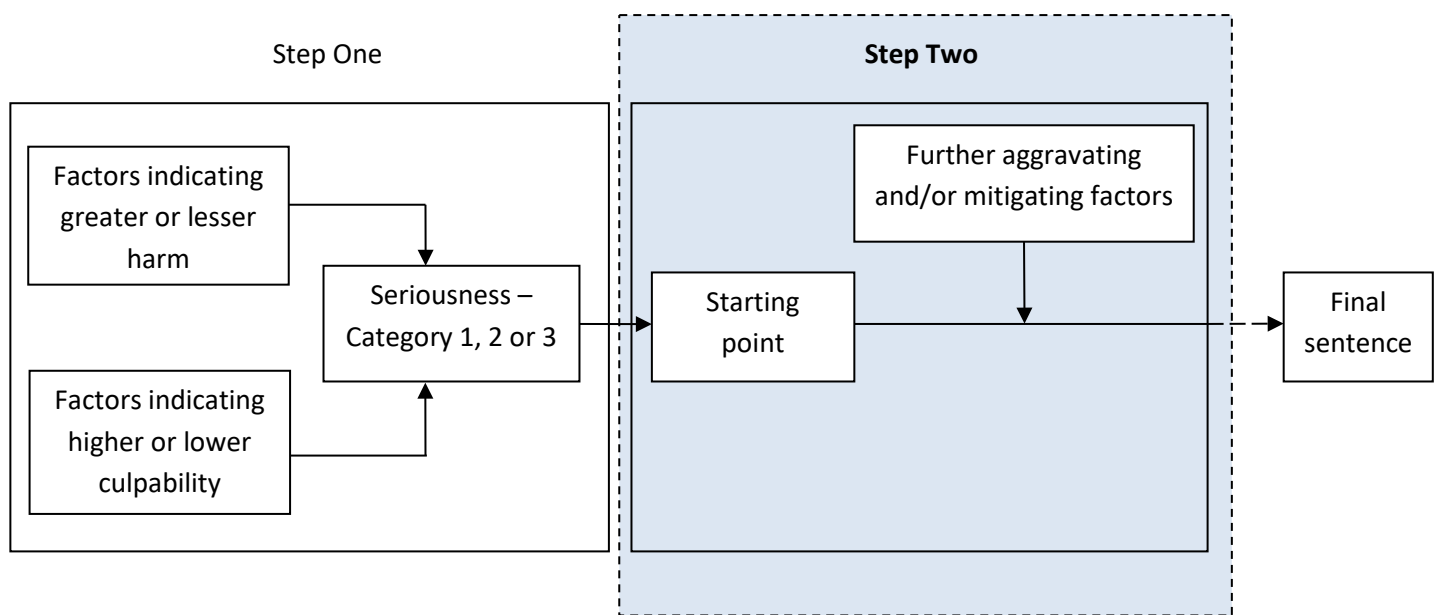


Figure 2.1. Flow diagram of steps one and two of the sentencing process required by the new (post-2011) England and Wales sentencing guidelines.

In order to analyse the distribution of step two MFs and AFs within the CCSS data, two contrasting, very commonly occurring offence categories were examined, namely assault and burglary. In the remainder of this chapter, the terms “assault” and “burglary” are used to refer to the category of assault offences, and the category of burglary offences, respectively. Both offence categories have new sentencing guidelines that were introduced at approximately the same time¹². Both offence categories have been studied individually in previous research using the CCSS data, but no research has ever compared the two directly. Offenders guilty of assault or burglary can receive a wide range of sentences encompassing everything from fines and/or community penalties through to substantial time in prison. Approximately 53% of assault offenders and 75% of burglars receive an immediate custodial sentence (based on the datasets analysed in this study), and many of those who do not will be close to the margin, as only relatively serious assaults or burglaries are sentenced in the Crown Court. This makes assault and burglary interesting offence categories from the point

¹² The new assault guideline came into force on 13 June, 2011; the new burglary guideline came into force on 16 January, 2012.

of view of personal mitigation, given that personal mitigation is often seen as being particularly important for determining whether an offender goes to prison or not.

2.2. Aims and Objectives

The main aim of this study was to investigate the role of PMFs in sentencing practice.

The objectives were:

1. To examine how PMFs co-occur with other MFs and with AFs in Crown Court sentencing cases.
2. To explore the relationships between PMFs and Crown Court sentencing outcomes.
3. To examine the strength of the relationships between the three character-based PMFs and sentence outcomes, relative to other PMFs and to each other.
4. To investigate whether the relationships between character-based PMFs and sentence outcomes vary across different types of offence (assault versus burglary).
5. To explore whether character-based PMFs interact with one another, i.e., whether the presence of one affects the impact of another and, if so, how.

2.3. Method

2.3.1. Design of the CCSS Datasets

The Sentencing Council has published the CCSS data as a series of Microsoft Excel data files, separated by offence category and year (Sentencing Council, 2015c). Table 2.1 presents a breakdown of cases contained in the CCSS datasets. In addition, the 2011 and 2012 files for assault and burglary offences are further subdivided to reflect changes to forms that took place during that period. New forms for assault and burglary offences were introduced in June 2011 and January 2012 respectively, in order to reflect the introduction of

new guidelines (see Appendix 3 for copies of the assault and burglary forms). In Table 2.1, data from these forms are headed “**New forms (1)**”. In April 2012, new forms were introduced for all offences (including assault and burglary). Data from these forms are headed “**New forms (2)**”. The April 2012 forms had an improved layout but did not ask any new questions (although certain question responses were amended). For further notes on the structure of the datasets, see Appendix 4 to this thesis.

Table 2.2

Number of cases contained in the CCSS datasets, by offence category and year

Offence category (CCSS form)	Number of cases					2013
	2011		2012			
	Old forms	New forms(1)	Old forms	New forms(1)	New forms(2)	
Arson & criminal damage	896	-	191	-	649	814
Assault & public order	9,081	5,420	181	3,094	8,553	11,510
Burglary	6,679	-	967	656	4,943	6,753
Offences causing death	620	-	150	-	687	710
Driving offences	1,991	-	495	-	1,318	1,886
Drug offences	9,000	-	2,426	-	6,364	9,373
Robbery & assault with intent to rob	3,425	-	924	-	2,212	2,985
Sexual offences	3,553	-	957	-	1,906	3,875
Theft, Dishonesty, Fraud	8,880	-	2,296	-	6,093	8,293
Other offences	4,504	-	990	-	3,017	4,545

<i>DATABASE TOTAL</i>	<i>48,629</i>	<i>5,420</i>	<i>9,577</i>	<i>3,750</i>	<i>35,742</i>	<i>50,744</i>
<i>No form returned*</i>	-		9,692		26,213	33,744
<i>Wrong form used**</i>	2,438		820		170	-

* This indicates that a CCSS form was not completed.

** This indicates that the wrong CCSS form was filled out, and so the data from that form could not be used.

2.3.1.1. Offences. Specific offences within each category are recorded in the CCSS datasets. Burglary includes aggravated burglary, domestic burglary, non-domestic burglary, and other burglary. Assault includes common assault, assault on a police constable, assault with intent to resist arrest, assault occasioning actual bodily harm (ABH), inflicting grievous bodily harm (GBH), and GBH with intent.

Sentence type

- Discharge
- Fine
- Community order
- Suspended sentence order
- Immediate custody (length given in categories e.g. >3 months to 6 months)
- Other

2.3.1.2. Aggravating factors (AFs). The AFs that were present in each case are recorded in the CCSS datasets. The AFs included in the data are all those listed in the guideline for each offence. Since AFs vary to some extent depending on the offence involved, the CCSS data covers all possible AFs for every offence within a given category. In each guideline, AFs are divided into step one and step two factors (see Figure 2.1 above).

Step one AFs for ***assault*** are set out below. The list is stated in the guideline to be *exhaustive*. Step one AFs are divided into those indicating greater harm, and those indicating

higher culpability. Higher culpability factors include those specified by statute, and other factors.

Greater harm AFs

- Injury serious in the context of the offence
- Vulnerable victim
- Sustained/repeated assault

Higher culpability AFs

- Statutory factors:
 - Motivated by hostility to sexual orientation
 - Motivated by hostility to disability
- Other factors:
 - Premeditation
 - Use of weapon/equivalent
 - Intention to commit more serious harm
 - Deliberately causes more harm
 - Vulnerable victim deliberately targeted
 - Leading role in group/gang
 - Motivated by hostility to age, sex, gender identity

Step two AFs for **assault** are presented in the guideline as a *non-exhaustive* list. They are divided into statutory AFs and other AFs.

Statutory AFs

- previous convictions (1-3, 4-9, 10+)
- offence committed on bail

Other AFs

- location of offence
- timing of offence
- ongoing effect on victim
- offence against public sector/service worker
- gratuitous degradation
- victim forced to leave home
- failure to comply with court orders
- offence committed on licence
- abuse of power/trust
- exploiting contact arrangements with child
- evidence of community impact

- steps taken to prevent reporting/assisting prosecution
- Offences taken into consideration (TICs)

Step one AFs for **burglary** are set out below. As with assault, the list is stated in the guideline to be *exhaustive*. Step one AFs are divided into those indicating greater harm, and those indicating higher culpability.

Greater harm AFs

- significant degree of loss
- soiling/ransacking/vandalism
- victim on/returns to premises
- significant psychological injury/trauma
- violence used/threatened
- Context of general public disorder

Higher culpability AFs

- deliberately targeted
- Significant degree of planning
- Equipped for burglary
- Weapon present/carried
- Member of group/gang

Step two AFs for **burglary** are presented in the guideline as a *non-exhaustive* list.

They are divided into statutory AFs and other AFs.

Statutory AFs

- previous convictions (1-3, 4-9, 10+)
- offence committed on bail

Other AFs

- child at home/returns
- offence committed at night
- abuse of power/trust
- gratuitous degradation
- prevention of reporting/assisting prosecution
- victim compelled to leave home
- evidence of community impact
- under the influence of alcohol/drugs
- failure to comply with court orders
- on licence

- TICs

2.3.1.3. Mitigating factors. The MFs that were present in each case are also recorded in the CCSS datasets. The MFs included in the data are all those listed in the guideline for each offence. Since MFs, like AFs, vary to some extent depending on the offence involved, the CCSS data covers all possible MFs for every offence within a given category. In each guideline, MFs are divided into step one and step two factors (see Figure 2.1 above).

Step one MFs for *assault* are set out below. The list is stated in the guideline to be *exhaustive*. Step one MFs are divided into those indicating lesser harm, and those indicating lower culpability.

Lesser harm MFs

- Injury less serious in the context of the offence

Lower culpability MFs

- Subordinate role in group/gang
- Provocation
- No premeditation
- Mental disorder/learning disability (linked to offence)
- Excessive self defence

Step two MFs for *assault* are presented in the guideline as a *non-exhaustive* list. They are divided into statutory MFs and other MFs.

Statutory MFs

- guilty plea (+ when entered and discount given)

Other MFs

- no previous relevant convictions
- single blow
- remorse
- good character/exemplary conduct
- Addressing addiction/behaviour
- serious medical conditions

- isolated incident
- age/lack of maturity affecting responsibility
- lapse of time not fault of offender
- mental disorder/learning disability (not linked to offence)
- sole/primary carer

Step one MFs for **burglary** are set out below. The list is stated in the guideline to be *exhaustive*. Step one MFs are divided into those indicating lesser harm, and those indicating lower culpability.

Lesser harm MFs

- no physical psychological injury
- no violence used/threatened
- nothing stolen or very low value
- limited damage/disturbance

Lower culpability MFs

- offender exploited by others
- committed on impulse/limited intrusion
- mental disorder/learning disability (linked to offence)

Step two MFs for **burglary** are presented in the guideline as a *non-exhaustive* list.

They are divided into statutory MFs and other MFs.

Statutory MFs

- guilty plea (+ when entered and discount given)

Other MFs

- subordinate role in group/gang
- injuries caused recklessly
- nothing stolen/very little value
- made voluntary reparation
- no previous relevant convictions
- remorse
- good character/exemplary conduct
- determination to address addiction/behaviour
- serious medical conditions
- age/lack of maturity affecting responsibility
- lapse of time not fault of offender
- mental disorder/learning disability (not linked to offence)

- sole/primary carer

2.3.1.4. Other legal factors. The CCSS datasets include some other variables that are stated by law to be relevant to the severity of a sentence.

- Offence seriousness (category 1, 2, or 3 – see Figure 2.1 above)
- Guilty plea: timing and percentage reduction applied

2.3.1.5. Extra-legal factors. The CCSS datasets include two variables that are “extra-legal”, i.e., as a matter of law, they should be irrelevant to the sentencing process.

- Age
- Gender

2.3.2. Ethical Considerations

All of the data used in the present study are publicly available on the Sentencing Council website, and were downloaded from the following location:

<https://www.sentencingcouncil.org.uk/analysis-and-research/crown-court-sentencing-survey/record-level-data/>. The Sentencing Council website explicitly states that these data

“can be used for analysis” (Sentencing Council, 2018, paragraph 1) and the data user guides state that “The Council hope that publishing this record level data will enable others to make use of the data to research further on sentencing and sentencing practice” (e.g. Sentencing Council, 2015b, p.4). The CCSS data are fully anonymised to protect the identity of the individuals recorded in the data sets. Notable features to ensure anonymity include that fine amounts are not recorded and, for custodial sentences, sentence lengths are recorded in 12 bands (up to 3 months, between 3 and 6 months, between 6 and 12 months, etc.) rather than providing exact sentence lengths. Retrospective ethical approval for the present study was obtained from the Middlesex University Psychology Research Ethics Committee (REF: 3517).

2.4. Analysis of the CCSS Data for Assault

In order to create an assault dataset, the 2013 CCSS data were amalgamated with the new form 2011 assault and public order data and all of the 2012 assault and public order data. This produced an initial dataset of 28,577 cases. Offences for which no new sentencing guidelines exist were removed from the dataset (affray, cruelty/neglect of a child, harassment, s.4 of the Public Order Act 1986 (POA), s.4a of the POA, s.5 of the POA, violent disorder, and offences classed as “other assault and public order”¹³). Cases of assault on a police officer and assault with intent to resist arrest were also removed from the dataset, as there were too few cases to permit statistical analysis¹⁴.

The remaining dataset comprised **20,245** cases across the four most frequently occurring assault offences. The dataset included 2,703 cases of common assault; 9,699 cases of assault occasioning Actual Bodily Harm (ABH; s.47 of the Offences Against the Person Act 1861 (OAPA)); 5,463 cases of inflicting Grievous Bodily Harm (GBH; s.20 OAPA); and 2,380 cases of GBH with intent (s.18 OAPA). The dataset contained 90.6% male offenders and 9.4% female offenders.

2.5. Findings for Assault

2.5.1. Distribution of MFs and AFs in the Assault Dataset

The step two AFs and MFs listed in the assault guideline and therefore found in the assault dataset are set out in Table 2.2. These are organised by the percentage of cases in the dataset that include each factor. The three most frequently occurring AFs were previous convictions (present in 52.5% of cases), location (35.5%), and under the influence (27.6%).

¹³ These offences together comprised 7,897 cases.

¹⁴ There were 144 cases of assault on a police officer between 2011 and 2013. There were 50 cases of assault with intent to resist arrest between 2011 and 2013.

The three most frequently occurring MFs were remorse (present in 35.7% of cases), no previous convictions (26.4%), and single blow (20.3%).

Table 2.3

Percentage (and frequency) of AFs and MFs in assault cases sentenced in the Crown Court

Sentencing factor	% of cases (frequency)
Aggravating factors	
<i>Previous convictions</i> ¹⁵	52.5 (9,607)
<i>Location</i> of the offence	35.5 (7,181)
Commission of offence whilst <i>under the influence</i> of alcohol or drugs	27.6 (5,595)
<i>Ongoing effect</i> upon the victim	23.0 (4,648)
<i>Presence of others</i> including relatives, especially children or partner of the victim	19.3 (3,900)
<i>Timing</i> of the offence	18.4 (3,725)
Failure to comply with <i>current court orders</i>	7.4 (1,493)
<i>Previous violence</i> or threats to the same victim	6.4 (1,296)
<i>Offence committed against</i> those working in the <i>public sector</i> or providing a service to the public	4.6 (940)
<i>Abuse of power</i> and/or position of trust	3.0 (612)
Offence committed whilst <i>on bail</i>	2.7 (547)
Offence committed whilst <i>on licence</i>	2.5 (507)
<i>Gratuitous degradation</i> of victim	2.2 (455)
In domestic violence cases, <i>victim forced to leave</i> their home	2.1 (426)
<i>Failure to respond to warnings</i> or concerns expressed by others about the offender's behaviour	1.5 (313)
<i>An attempt to conceal</i> or dispose of <i>evidence</i>	0.9 (190)
<i>Any steps taken to prevent</i> the victim <i>reporting</i> an incident, or obtaining assistance and/or from assisting or supporting the prosecution	0.6 (125)
Established evidence of <i>community impact</i>	0.4 (77)
<i>Exploiting contact</i> arrangements with a child to commit an offence	0.2 (40)

¹⁵ This is an abbreviation of "Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence, and b) the time that has elapsed since the conviction" (Sentencing Council, 2011a, p. 5).

Offences taken into consideration (<i>TICs</i>)	0.1 (14)
Mitigating factors	
<i>Remorse</i>	35.7 (7,219)
<i>No previous relevant convictions</i> or no relevant/recent convictions	26.4 (5,341)
<i>Single blow</i>	20.3 (4,107)
<i>Isolated incident</i>	16.8 (3,402)
<i>Good character and/or exemplary conduct</i>	16.7 (3,376)
<i>Age and/or lack of maturity</i> where it affects the responsibility of the offender	8.8 (1,779)
<i>Determination and/or demonstration of steps taken to address addiction or offending behaviour (addressing addiction)</i>	8.3 (1,672)
<i>Mental disorder/learning disability</i> or learning disability, where not linked to the commission of the offence	3.4 (684)
<i>Sole or primary carer</i> for dependent relatives	4.1 (820)
<i>Lapse of time</i> since the offence where this is not the fault of the offender	2.7 (542)
<i>Serious medical conditions</i> requiring urgent, intensive or long-term treatment	2.6 (528)

Note. MFs in **bold** are the three character-based PMFs that are the main focus of this study. Words in *italics* are the abbreviations used to refer to each AF or MF through the remainder of the assault analysis.

The next step in the analysis of the dataset was to identify the number of cases within the assault dataset that contain different frequencies of MFs or AFs. Overall, 61.6% of assault cases (12,477) involved one or more MFs, while 77.0% of cases (15,588) involved one or more AFs. The detailed breakdown of the frequency of assault cases involving one or more MF or AF is presented in Figure 2.2 below.

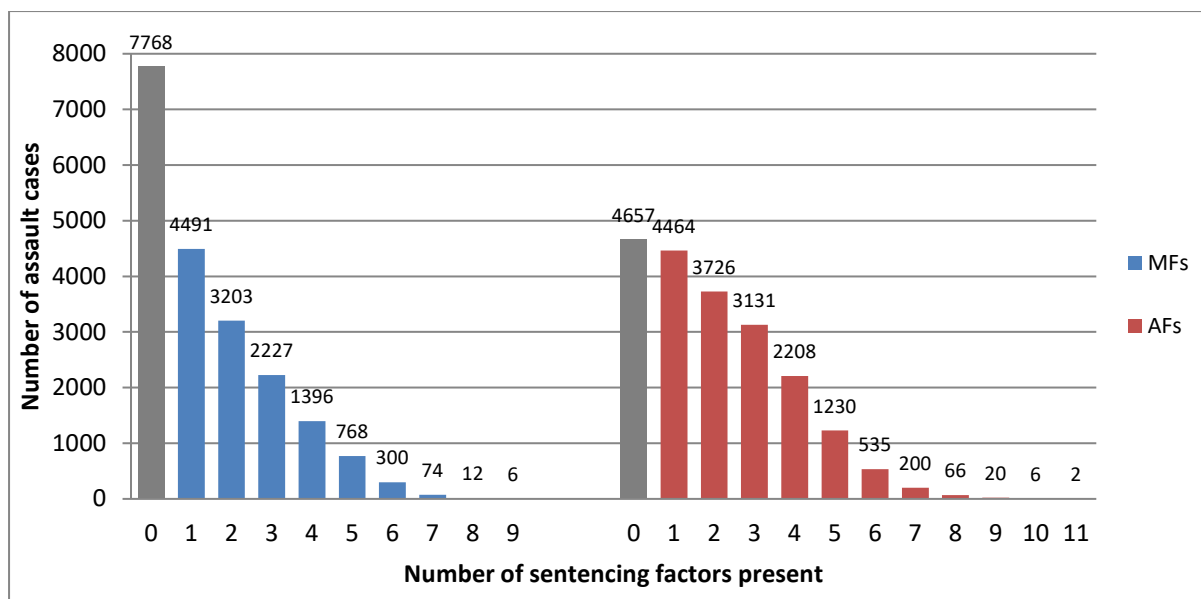


Figure 2.2. Frequency of assault cases involving one or more MF or AF. The grey bars represent cases where either no MFs or no AFs are present.

MFs and AFs also frequently occur together in Crown Court cases. Figure 2.3 shows the distribution of assault cases involving different numbers of MFs and/or AFs. Overall, 8.9% of cases involved no AFs or MFs. 29.5% of cases involved one or more AFs but no MFs, 14.1% involved one or more MFs but no AF, and 47.5% involved one or more MFs *and* one or more AFs. Amongst those cases where both AFs and MFs were present, 45.4% involved more AFs than MFs, 32.7% involved more MFs than AFs, and 21.9% had the same number of AFs and MFs present.

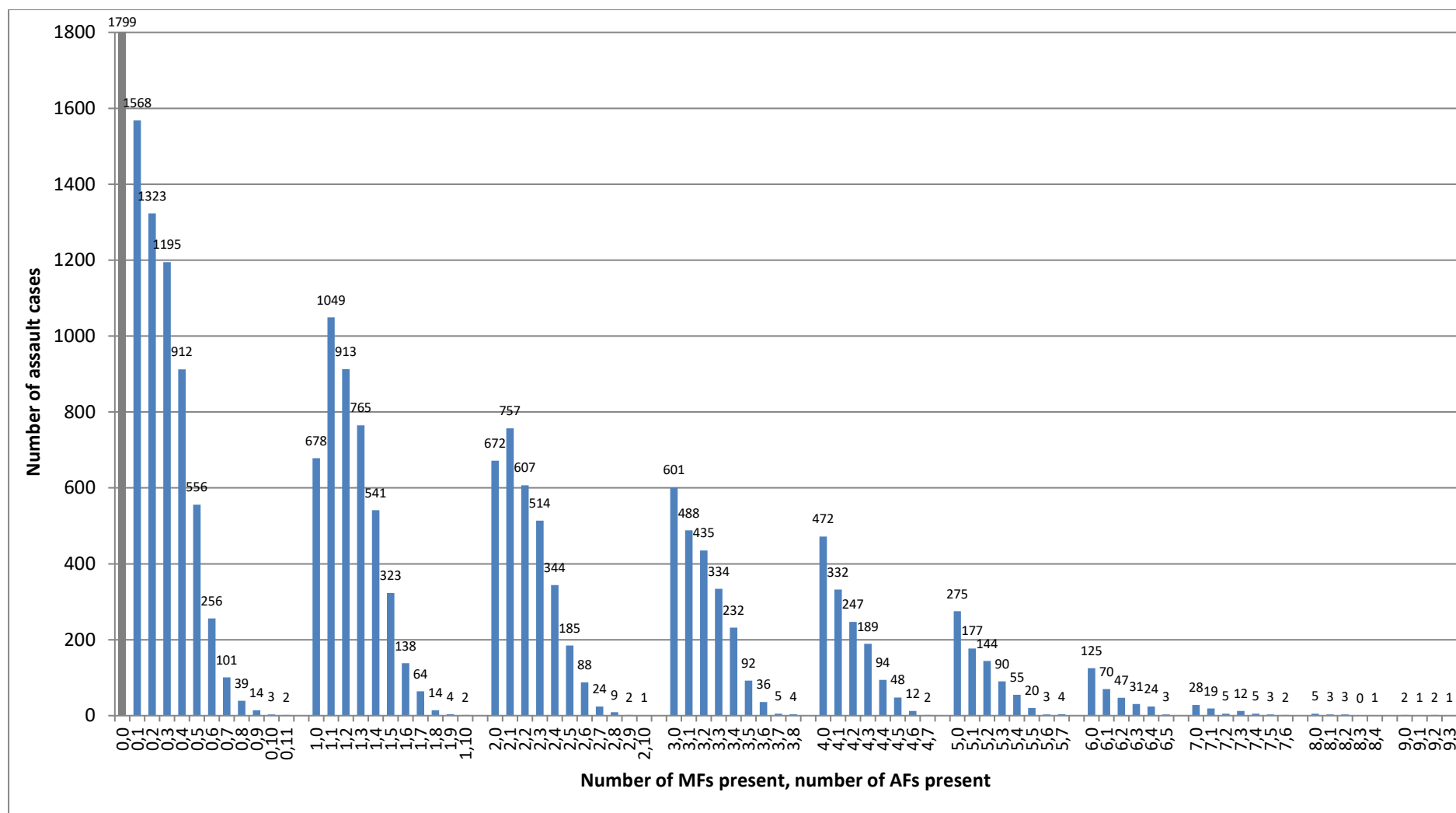


Figure 2.3. Number of assault cases involving different combinations of MFs and AFs, organised by MFs. The first grouping represents 0 MFs + 0-11 AFs, in the format “MF#, AF#”; the second grouping represents 1 MF + 0-9 AFs; etc. The grey bar represents cases where no MFs or AFs are present.

In line with the study's focus on PMFs that are particularly related to the evaluation of an offender's character, the next set of analyses examined the distribution of remorse, good character, and addressing addiction in the assault dataset. First, crosstabs were used to examine the extent to which the three PMFs co-occur within the assault dataset. Figure 2.4 shows that there is significant cross-over between the three PMFs: 70.2% of good character cases and 70.0% of addressing addiction cases also included remorse and 44.8% of remorse cases also included one or both of the other two PMFs.

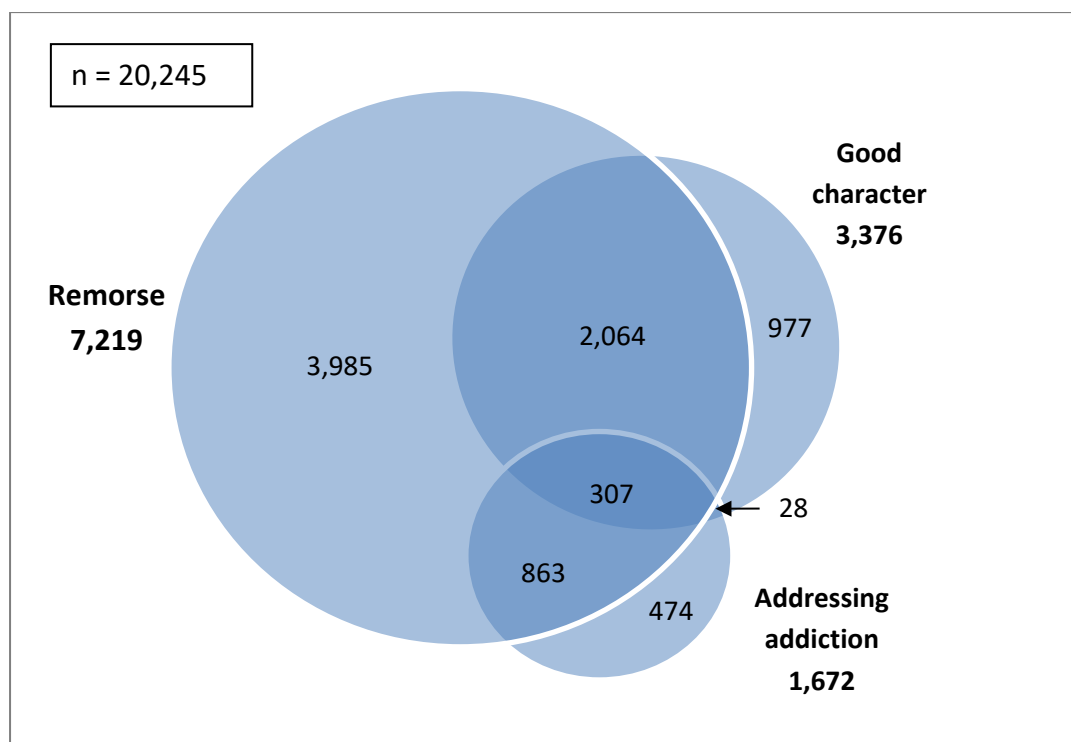


Figure 2.4. Venn diagram showing frequency of remorse, good character and addressing addiction across Crown Court assault cases. Circle sizes and positions are approximate only.

Second, Figures 2.5 and 2.6 show the extent to which the three PMFs co-occurred in the assault dataset with other MFs or with AFs. Remorse was relatively more likely to occur without other MFs than the other two PMFs. Both remorse and addressing addiction most often occurred with one or two other MFs, while good character was most likely to occur with two or three other MFs.

With regard to AFs, good character was much more likely than the other PMFs to occur without AFs. Zero or one AFs were most likely for remorse and one or two AFs were most likely for addressing addiction.

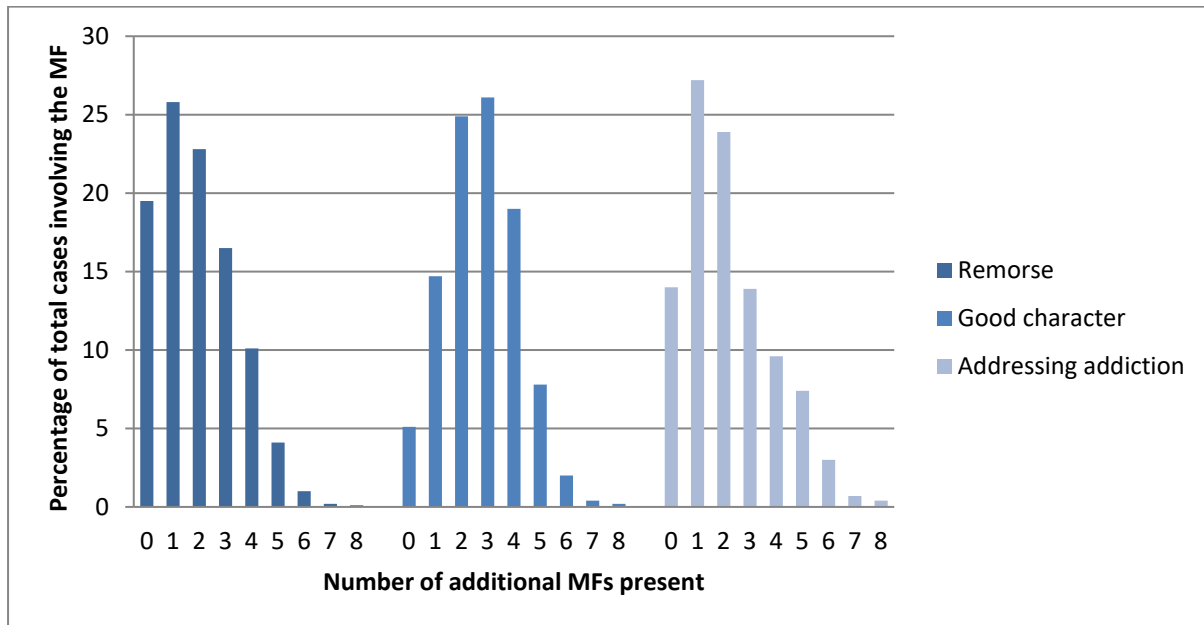


Figure 2.5. Co-occurrence of selected PMFs with other MFs in Crown Court assault cases.

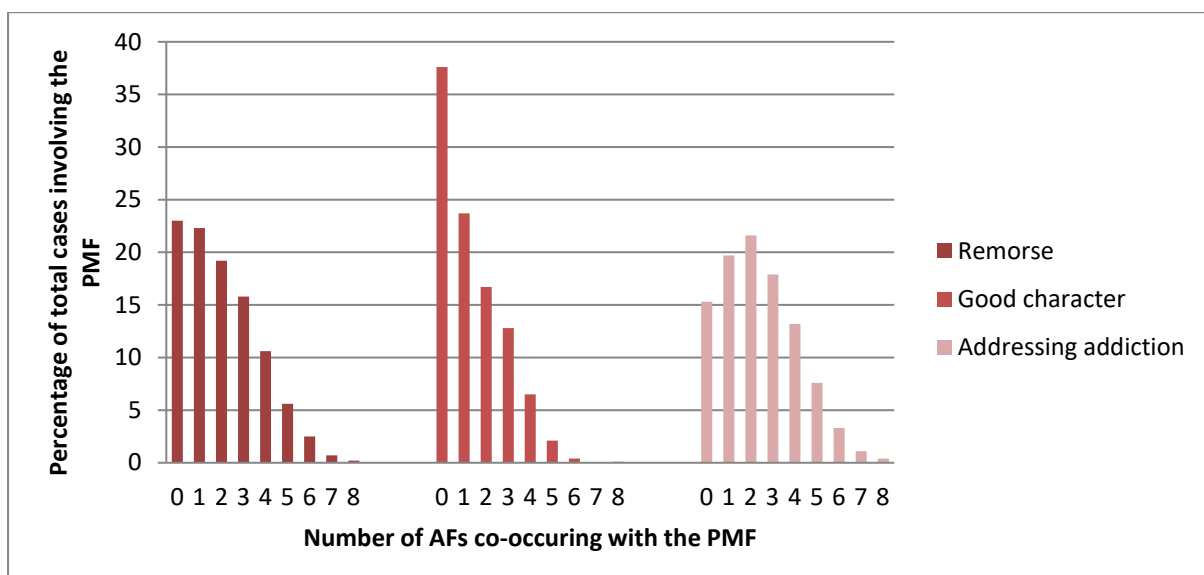


Figure 2.6. Co-occurrence of selected PMFs with AFs in Crown Court assault cases.

2.5.2. Associations Between MFs and AFs and Sentencing Outcomes

After investigating the distribution of MFs and AFs within the assault dataset, the study next examined the relationship between MFs, AFs and sentencing outcomes. Sentencing options available for assault include custody (immediate or suspended), a community penalty such as unpaid work and/or drug/alcohol rehabilitation, a fine, or a discharge. Across the assault dataset, 52.9% of offenders received immediate custody, 30.4% received a suspended sentence, 13.5% received a community order, 0.8% received a fine, and 1.4% received a discharge¹⁶. Mean sentence length cannot be calculated from the dataset because sentence lengths are recorded in 12 categories - up to three months; over three months and up to six months; over six months to less than 12; 12 months; over 12 months and up to 18 months; over 18 months and up to three years; over three years and less than four years; four years; over four years and up to five years; over five years and up to 10 years; over 10 years and less than life; and life or indeterminate. The three most common sentence lengths in the dataset were over 18 months and up to three years (23.3%), over 12 months and up to 18 months (18.3%), and over six months to less than 12 (14.4%).

The sentencing outcome chosen for the present analysis was whether or not an offender received an immediate custodial sentence, since research suggests that personal mitigation can have a particular impact on a sentencer's decision whether to imprison or not (Hough, Jacobson & Millie, 2003; Jacobson & Hough, 2007; Millie, Tombs & Hough, 2007; Sentencing Council, 2012, 2013a, 2014). This binary variable has frequently been examined by sentencing researchers both in the UK and elsewhere (e.g. Bond & Jeffries, 2011; Lightowlers & Pina-Sanchez, 2017; Maslen, 2015a; Roberts & Pina-Sanchez, 2014; Snowball & Weatherburn, 2007; Steffensmeier, Ulmer & Kramer, 1998; Wooldredge, 2010).

¹⁶ 1.0% of offenders received a sentence that did not fall into any of the above categories.

2.5.2.1. Presence of an MF, an AF or both. The study first examined whether the presence of an MF or an AF predicts whether an offender will receive a custodial sentence. The study compared cases in the assault dataset involving only one MF, one AF, or one MF and one AF with cases where no MFs or AFs were present. Figure 2.7 shows the percentage of immediate custody associated with each of the MF/AF combinations.

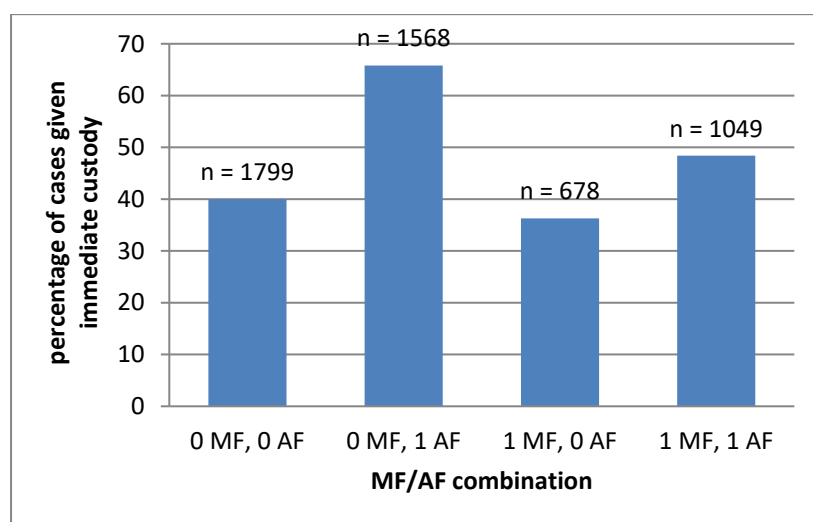


Figure 2.7. Percentage of assault cases that receive an immediate custodial sentence when differing MF and/or AF combinations are present.

Loglinear analysis was used to explore the association between the presence of an MF and/or an AF and whether an offender received an immediate custodial sentence. The analysis first examined all assault offences, then the four specific offences within the assault dataset. A two-way loglinear analysis for MF/AF combination and sentencing outcome (immediate custody or not) produced a model that retained all effects. The model's likelihood ratio was $\chi^2(0) = 0, p = 1$. The interaction between MF/AF combination and outcome was significant, $\chi^2(3) = 283.15, p < .001$. Odds ratios indicated that offenders were 1.17 times less likely to receive an immediate custodial sentence when one MF and no AF was present, compared to no MF or AF, but the difference was not statistically significant. Where one AF and no MF was present, offenders were 2.88 times more likely to receive immediate custody,

compared to no MF or AF ($\chi^2(1) = 223.34, p < .001$). When one MF and one AF were present, offenders were 1.4 times more likely to receive immediate custody than when no MF or AF was present ($\chi^2(1) = 19.09, p < .001$).

Figure 2.8 shows the percentage of immediate custody associated with each of the MF/AF combinations, broken down by the four specific assault offences contained in the assault dataset.

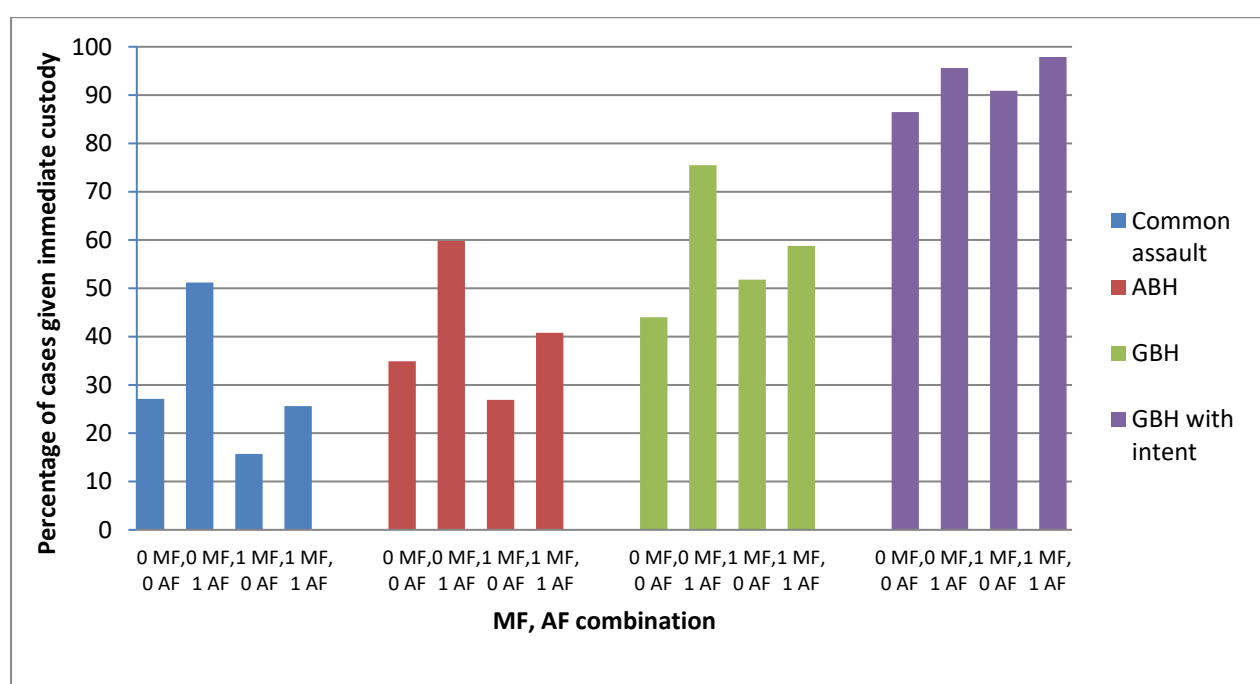


Figure 2.8. Percentage of cases with differing MF and/or AF combinations that receive an immediate custodial sentence, by specific assault offence.

A three-way loglinear analysis including the four specific assault offences, MF/AF combination and sentencing outcome (immediate custody or not) also produced a model that retained all effects. The likelihood ratio of this model was $\chi^2(0) = 0, p = 1$. The analysis indicated that the highest-order interaction (offence x MF/AF combination x outcome) was significant, $\chi^2(9) = 24.01, p = .004$. To break down this effect, chi-square tests for the MF/AF combination and outcome variables were performed separately for each offence and odds ratios calculated. The results are presented in Table 2.3 below. Of the four assault offences,

common assault is considered least serious, then Actual Bodily Harm (ABH), then Grievous Bodily Harm (GBH), then GBH with intent.

Chi-square tests showed that each offence was associated with a higher likelihood of immediate custody than the one immediately below it in seriousness (ABH vs. common assault - $\chi^2(1) = 100.11, p < .001$; GBH vs. ABH - $\chi^2(1) = 162.35, p < .001$; GBH vs. GBH with intent - $\chi^2(1) = 1267.20, p < .001$). For all four offences, the presence of one AF increased the odds of a custodial sentence compared to cases with no AF or MF. However, while the presence of one MF reduced the odds of a custodial sentence for common assault and ABH cases, for GBH and GBH with intent cases one MF did not make a significant difference to the odds of a custodial sentence, compared to cases with no AF or MF. Common assault cases involving one AF and one MF had the same odds of receiving custody as cases with neither factor, indicating that the AF and MF balanced each other out. For the other three offences, cases with both an AF and an MF were associated with higher odds of custody than cases with no AF or MF, suggesting that the presence of an AF tended to override the presence of an MF.

Table 2.4

χ^2 and odds ratios for differing MF and AF combinations by specific assault offence

Specific offence	χ^2 for MF/AF x custody or not	0 MF, 1 AF vs. 0 MF, 0 AF		1 MF, 0 AF vs. 0 MF, 0 AF		1 MF, 1 AF vs. 0 MF, 0 AF	
		Odds ratio	χ^2	Odds ratio	χ^2	Odds ratio	χ^2
Common assault	64.41***	2.84	38.12***	0.51	6.21*	0.92	.118
ABH	153.65***	2.81	102.24***	0.70	7.37**	1.30	4.81*
GBH	75.43***	3.95	73.64***	1.38	2.52	1.82	14.28**
GBH with intent	15.37*	3.41	9.07**	1.56	.85	7.33 ⁺	9.36**

Note. * $p < .05$ ** $p < .01$ *** $p < .001$. ⁺ Expected count in one cell was < 5 (4.94) and so the odds ratio may be inaccurate. Cramer's V for this comparison was .19, (on a scale from 0 to 1), suggesting a relatively small effect.

2.5.2.2. Independent effects of individual MFs and AFs. Descriptive statistics for the percentage of assault cases involving immediate custody that were associated with each of the step two MFs and AFs are included at Appendix 5. A binary logistic regression was carried out in order to examine the extent to which individual step two MFs and AFs predict immediate custodial sentences independent of the effects of all other step two MFs and AFs (and other relevant variables). The predictor variables were the step two sentencing factors listed in the assault guidelines (see Table 2.2 above), coded as dummy variables (i.e., 1 = present, 0 = absent). The binary outcome variable was whether or not an offender received an immediate custodial sentence.

Crosstabs confirmed that all step two MFs and AFs were significantly correlated with the outcome variable and so all were included in the logistic regression model. Two other predictor variables were included in the regression model to control for their independent effects on sentence outcomes. These were: specific assault offence (a four-level categorical variable comprising common assault, ABH, GBH, and GBH with intent, with common assault being the reference category) and offence seriousness (a three-level categorical variable, with category 3 – the least serious category – being the reference category). Offence seriousness was included to capture the cumulative effect on sentence outcome of step one AFs and MFs.

The model was found to be significantly different from a constant-only model ($\chi^2(36) = 9462.76, p < .001$) and predicted 83.0% of immediate custody sentences and 78.2% of other sentences correctly, giving an overall success rate of 80.8%. Residual statistics were examined (including Cook's distance, leverage, DFBetas and standardised residuals) and did not raise any concerns.

Table 2.4 shows regression coefficients, standard errors, odds ratios, and 95% confidence intervals for the odds ratios for each predictor. The results for the three PMFs of interest (remorse, good character and addressing addiction) are marked in bold.

Table 2.5

Results from binary logistic regression of step two assault MFs and AFs predicting immediate custody

Predictor	<i>b</i>	Std error	Exp(<i>b</i>) (Odds ratio)	95% C.I. for Exp(<i>b</i>)	
				Lower	Upper
Constant	-2.343***	0.91	.096		
Aggravating factors					
Previous convictions	0.800***	0.051	2.225	2.013	2.460
Location	0.186**	0.054	1.204	1.083	1.339
Under the influence	0.237***	0.048	1.267	1.153	1.392
Ongoing effect	0.585***	0.054	1.795	1.616	1.993
Presence of others	0.291***	0.056	1.338	1.199	1.494
Timing	0.111	0.064	1.118	.985	1.268
Current court orders	1.221***	0.094	3.392	2.819	4.080
Previous violence	0.513***	0.094	1.670	1.388	2.009
Offence against public sector	0.502***	0.097	1.651	1.365	1.998
Abuse of power	0.498***	0.127	1.646	1.283	2.111
On bail	1.163***	0.152	3.199	2.375	4.308
On licence	1.693***	0.184	5.436	3.793	7.789
Gratuitous degradation	0.676***	0.164	1.966	1.427	2.709
Victim forced to leave	0.504**	0.161	1.656	1.207	2.271
Failure to respond to warnings	0.714***	0.193	2.043	1.400	2.980
Attempt to conceal evidence	2.522***	0.465	12.458	5.003	31.019
Steps taken to prevent reporting	0.356	0.347	1.428	0.724	2.819
Community impact	0.190	0.334	1.210	0.616	2.375
Exploiting contact	0.881	0.536	2.412	0.843	6.903
TICs	-1.281	1.507	0.278	0.014	5.325
Mitigating factors					
Remorse	-0.628***	0.048	0.533	0.486	0.586

No previous convictions	-0.281***	0.061	0.755	0.670	0.850
Single blow	-0.375***	0.054	0.688	0.618	0.764
Isolated incident	-0.699***	0.065	0.497	0.438	0.565
Good character	-0.526***	0.069	0.591	0.516	0.676
Age and/or lack of maturity	-0.384***	0.080	0.681	0.583	0.796
Addressing addiction	-1.355***	0.082	0.258	0.220	0.303
Mental disorder	-1.053***	0.126	0.349	0.273	0.446
Sole or primary carer	-1.288***	0.117	0.276	0.219	0.347
Lapse of time	-0.908***	0.138	0.403	0.308	0.529
Serious medical conditions	-1.228***	0.149	0.293	0.219	0.393
Specific offence					
s.47 (ABH)	0.735***	0.070	2.086	1.818	2.393
s.20 (GBH)	1.835***	0.078	6.263	5.377	7.296
s.18 (GBH with intent)	5.956***	0.183	386.075 ¹⁷	269.740	552.583
Seriousness					
Category 2	0.849***	0.067	2.337	2.049	2.666
Category 1	2.332***	0.077	10.301	8.856	11.982

Note. * $p < .05$ ** $p < .01$ *** $p < .001$. $R^2 = .399$ (Hosmer & Lemeshow), .423 (Cox & Snell), .565 (Nagelkerke).

Some sentencing factors that failed to reach statistical significance as predictors in the logistic regression may have done so because they occurred only rarely in the data. This was true of several AFs that occurred in fewer than 1% of cases, namely *TICs* (0.1%), *exploiting contact* (0.2%), *community impact* (0.4%), and *steps taken to prevent reporting* (0.6%). A similar pattern was evident in the burglary dataset.

Figures 2.9 and 2.10 compare the odds ratio scores for each MF and AF from the logistic regression with the percentage of cases receiving immediate custody that are associated with each MF and AF. The figures for percentage of cases receiving custody are purely descriptive statistics of the kind published by the Sentencing Council in its annual

¹⁷ The sentencing range for a category 3 GBH with intent offence (the lowest category) is 3-5 years' custody and offenders convicted of GBH with intent receive a custodial sentence in 96.8% of cases. The extremely high odds ratio may simply reflect this fact.

CCSS reports (e.g., Sentencing Council, 2014) and therefore do not allow for the independent effects of other MFs and/or AFs or other variables such as offence seriousness that may co-occur with the MF or AF in question.

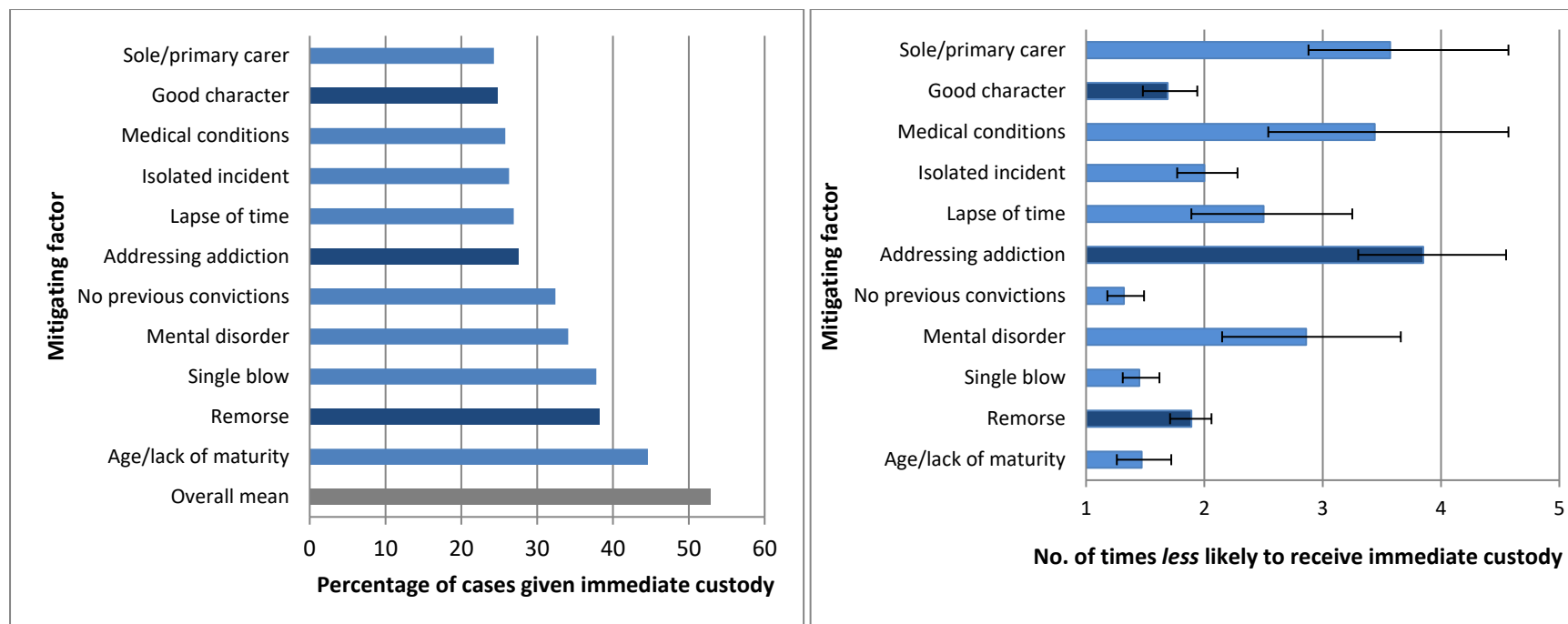


Figure 2.9. Percentage of cases given immediate custody that are associated with each MF in the assault dataset (left-hand graph), compared to the number of times *less* likely an offender is to receive immediate custody if each MF is present, based on the results of a binary logistic regression (right-hand graph). Character-based PMFs are shaded dark blue. Error bars in the right-hand graph are 95% confidence intervals.

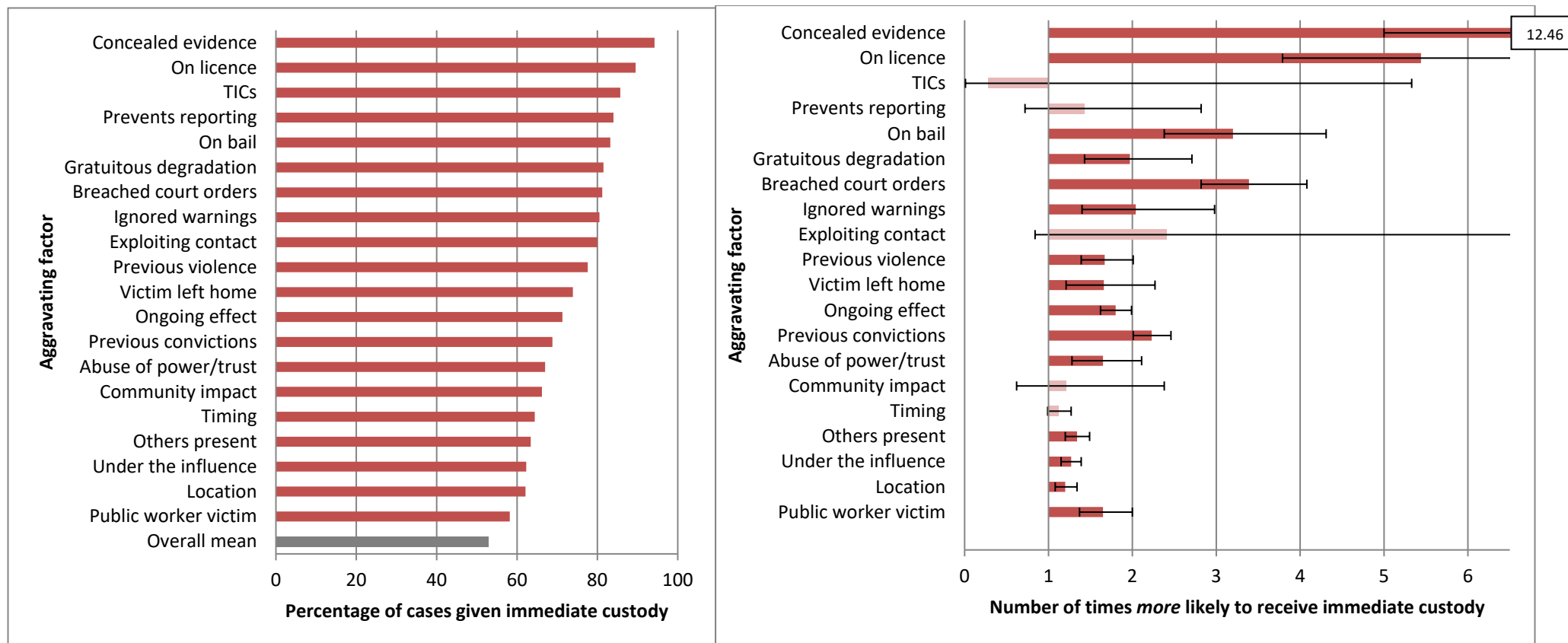


Figure 2.10. Percentage of cases given immediate custody that are associated with each AF in the assault dataset (left-hand graph) compared to the number of times *more* likely an offender is to receive immediate custody if each AF is present, based on the results of a binary logistic regression (right-hand graph). In the right-hand graph, error bars are 95% confidence intervals and non-significant results are shaded in pink.

2.5.2.3. Interactions between variables. A second binary regression model was run to test for specific interactions between the predictor variables. In each case, a significant interaction indicates that the effect of one variable differs depending on whether the other variable is present or absent (and vice versa). First, two-way interactions were examined amongst the three PMFs of interest (remorse, good character and addressing addiction). Second, the model tested for interactions between each PMF of interest and previous convictions. Previous convictions was chosen because Maslen (2015a) proposed that remorse may have less impact for repeat offenders, but she found no interaction between remorse and previous convictions. Therefore, it was decided to test for this interaction again, using a larger sample and a more comprehensive set of predictor variables, to see if there was any relationship between previous convictions and any of remorse, good character, or addressing addiction. The third group of interactions tested was between each PMF of interest and ABH, GBH and GBH with intent (with common assault being the reference category). This last group of interactions was tested because Maslen (2015a) found a positive interaction between remorse and offence seriousness.

The interaction model was found to be significantly different from the model without interactions ($\chi^2(15) = 78.25, p < .001$)¹⁸ and predicted 83.0% of immediate custody sentences and 78.1% of other sentences correctly, giving an overall success rate of 80.8%. Table 2.5 shows regression coefficients, standard errors, odds ratios, and 95% confidence intervals for the odds ratios for each interaction term. The main effects of all of the predictor variables from the model presented in Table 2.4 were also included in the interaction model but are omitted from Table 2.5. The omission of main effects is for two reasons: firstly for clarity,

¹⁸ For both assault and burglary, the models including the interactions had a lower deviance score (-2LL) than the model without the interactions. In each case, the chi-square statistics (reported in the main text) indicated that the difference between the two models was significant.

and secondly because they would be misleading. In the model that includes interaction effects, the *b*-weights produced for the ‘main effects’ of each predictor variable involved in the interactions are not true main effects. Instead of representing the effect of the predictor with all the other predictors controlled for, the *b*-weights represent the effect of each predictor involved in interactions *when the values of all interacting predictors are zero*.

Table 2.6

Results from binary logistic regression to examine selected interactions between variables predicting immediate custody

Interaction	<i>b</i>	Std error	Exp(<i>b</i>) (Odds ratio)	95% C.I. for Exp(<i>b</i>)	
				Lower	Upper
Remorse*Good character	-0.139	0.138	0.871	0.664	1.141
Remorse*Addressing addiction	0.411*	0.174	1.509	1.073	2.122
Good character*Addressing addiction	0.174	0.286	1.190	0.679	2.085
Remorse*Previous convictions	-0.147	0.102	0.863	0.707	1.053
Good character*Previous convictions	-0.548*	0.254	0.578	0.351	0.951
Addressing addiction*Previous convictions	-0.270	0.189	0.763	0.527	1.105
Remorse*s.47 (ABH)	0.058	0.179	1.060	0.746	1.506
Remorse*s.20 (GBH)	0.319	0.186	1.376	0.956	1.979
Remorse*s.18 (GBH with intent)	1.476***	0.375	4.375	2.097	9.124
Good character*s.47 (ABH)	0.358	0.321	1.430	0.762	2.683
Good character*s.20 (GBH)	0.478	0.322	1.613	0.858	3.032
Good character*s.18 (GBH with intent)	0.628	0.463	1.873	0.756	4.639
Addressing addiction*s.47 (ABH)	-0.221	0.319	0.802	0.429	1.497
Addressing addiction*s.20 (GBH)	0.259	0.330	1.295	0.678	2.475
Addressing addiction*s.18 (GBH with intent)	1.185	0.626	3.272	0.959	11.158

Note. * $p < .05$ ** $p < .01$ *** $p < .001$.

There was a significant interaction between remorse and addressing addiction. For cases that did not involve addressing addiction, an offender was 2.1 (1/0.479) times less likely to receive immediate custody if remorse was present than if it was absent. For cases

that did involve addressing addiction, an offender was only 1.4 ($1/0.722$) times less likely to receive immediate custody if remorse was also present ($\exp(-0.736 + 0.411) = 0.722$). In other words, remorse had a weaker effect when addressing addiction was also present as a factor. Since interactions are symmetric, addressing addiction also had a weaker effect when remorse was present than when it was absent. Specifically, for cases that did not involve remorse, an offender was 4.3 ($1/0.234$) times less likely to receive immediate custody if addressing addiction was present than if it was absent. For cases that did involve remorse, an offender was only 2.8 ($1/0.353$) times less likely to receive immediate custody if addressing addiction was also present ($\exp(-1.452 + 0.411) = 0.353$). Perhaps each of these factors is under-valued when the other is present because they are both viewed as part of an offender taking responsibility for his or her offending behaviour.

An interaction effect was also found between good character and addressing addiction in the same direction as the interaction between remorse and addressing addiction, but the effect was much smaller, and did not reach statistical significance. In addition, the 95% confidence interval for the interaction's odds ratio included 1 (indicating that the odds ratio is unlikely to be reliable).

There was also a significant interaction between good character and previous convictions. For cases that did not involve previous convictions, an offender was 2.3 ($1/0.423$) times less likely to receive immediate custody if good character was present than if it was absent. For cases that did involve previous convictions, an offender was 4 times ($1/0.250$) less likely to receive immediate custody if good character was also present ($\exp(-0.840 + -0.548) = 0.250$). In other words, good character had a stronger effect when previous convictions was also present as a factor. This could be because cases involving no previous convictions tend not to result in a custodial sentence anyway, and so the presence of good character may not make as much difference to the outcome, whereas cases involving previous

convictions are more likely to be on the borderline between custody and a community sentence, where the presence of good character could have a more significant impact.

An interaction with previous convictions in the same direction was also found for both remorse and addressing addiction but the effects were smaller and did not reach statistical significance, and the 95% confidence intervals for their odds ratios included 1.

Finally, there was a significant interaction between remorse and GBH with intent. In assault offences other than GBH with intent, an offender was 2.1 (1/0.479) times less likely to receive immediate custody if remorse was present than if it was absent. In GBH with intent cases, an offender was 2 times more likely to receive immediate custody if remorse was present than if it was absent ($\exp(-0.736 + 1.476) = 2.096$). Interactions with GBH with intent in the same direction were found for addressing addiction and good behaviour but they were not significant. This result cannot easily be explained. Qualitative research carried out by the Sentencing Council to explore sentencers' perceptions of the assault guideline found that they thought mitigation counted for much more in ABH cases than in cases of GBH with intent (Lock, 2015). This may be because s18 is an intentional crime – GBH is committed by definition with the intention of seriously injuring the victim. Therefore, sentencers may be likely to view an offender who claims to be remorseful as disingenuous. If sentencers are generally closed (or even hostile) to the idea of mitigation for GBH with intent, it could be that there is some sort of backfire effect of pleading remorse, whereby a judge is more likely to give a custodial sentence to an offender who claims to be remorseful than one who does not.

2.6. Analysis of the CCSS Data for Burglary

In order to create a dataset of burglary offences, the 2013 CCSS burglary offences data were amalgamated with the 2012 burglary data. The 2011 data date from before the new guidelines for burglary were introduced in January 2012 and so are incompatible with the 2012 and 2013 data. This process produced an initial dataset of 11,907 cases. Cases classified as “other burglary” were removed from the dataset because these cases were not covered by the guidelines¹⁹. Aggravated burglary cases were also removed as there were too few cases to permit statistical analysis²⁰. The remaining dataset comprised **11,285** cases across two offences: domestic burglary and non-domestic burglary. The dataset contained 93.6% male offenders and 4.4% female offenders.

2.7. Findings for Burglary

2.7.1. Distribution of MFs and AFs Within the Burglary Dataset

The step two MFs and AFs listed in the burglary guideline and therefore found in the burglary dataset are set out in Table 2.6 below. These are organised by the percentage of cases in the dataset that include each factor. The three most frequently occurring AFs were previous convictions (present in 72.7% of cases), offence committed at night (26.1%), and under the influence (15.6%). The three most frequently occurring MFs were remorse (present in 21.5% of cases), addressing addiction (9.6%), and nothing stolen (9.3%).

¹⁹ 287 cases were removed from the dataset.

²⁰ 335 cases were removed from the dataset.

Table 2.7

Frequency of occurrence of individual sentencing factors in burglary cases, arranged by category and % present in the dataset.

Sentencing factor (Step 2)	% of cases (frequency)
Aggravating factors	
<i>Previous convictions</i> ²¹	72.7 (8,201)
Offence committed <i>at night</i>	26.1 (2,943)
Commission of the offence whilst <i>under the influence</i> of alcohol or drugs	15.6 (1,762)
Failure to comply with <i>current court orders</i>	11.9 (1,341)
Offence committed whilst <i>on licence</i>	10.4 (1,169)
Offences taken into consideration (<i>TICs</i>)	7.7 (873)
Offence committed whilst <i>on bail</i>	6.6 (745)
<i>Child at home</i> (or returns home) when offence committed*	4.7 (534)
<i>Abuse of power</i> and/or position of <i>trust</i> **	2.7 (310)
Established evidence of <i>community impact</i>	2.2 (243)
<i>Victim compelled to leave</i> their home (in particular victims of domestic violence)*	0.8 (93)
<i>Gratuitous degradation</i> of victim	0.6 (68)
<i>Any steps taken to prevent</i> the victim <i>reporting</i> the incident or obtaining assistance and/or from assisting or supporting the prosecution	0.4 (48)
Mitigating factors	
Remorse	21.5 (2,423)
Determination and/or demonstration of steps taken to address addiction or offending behaviour (<i>addressing addiction</i>)	9.6 (1,086)
<i>Nothing stolen</i> or only property of very low value to the victim (whether economic, commercial, sentimental or personal) ²²	9.3 (1,054)

²¹ This is an abbreviation of “Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence, and b) the time that has elapsed since the conviction” (Sentencing Council, 2011b, p. 5). NB: A third domestic burglary committed after 30/11/99 (after being convicted of two other burglaries) requires the court to apply s111 of the Powers of the Criminal Courts (Sentencing) Act 2000 and impose a custodial term of at least three years (unless it would be unjust to do so).

²² This mitigating factor only appears in the guideline for aggravated burglary (not included in the dataset) but was nevertheless cited in 822 cases of domestic burglary and 232 cases of non-domestic burglary.

<i>No previous convictions</i> or no relevant/recent convictions	9.2 (1,034)
<i>Age and/or lack of maturity</i> where it affects the responsibility of the offender	7.3 (821)
<i>Subordinate role</i> in a group or gang	5.3 (599)
<i>Good character and/or exemplary conduct</i>	3.9 (438)
<i>Mental disorder</i> or learning disability, where not linked to the commission of the offence	2.2 (246)
<i>Sole or primary carer</i> for dependant relatives	1.7 (190)
<i>Serious medical conditions</i> requiring urgent, intensive or long-term treatment	1.3 (152)
<i>Lapse of time</i> since the offence where this is not the fault of the offender	0.9 (103)
Offender has made <i>voluntary reparation</i> to the victim	0.9 (96)
<i>Injuries caused recklessly</i> ²³	0.1 (11)

Note. *Domestic burglary only. **Non-domestic burglary only. MFs in **bold** are the three character-based PMFs that are the main focus of this study. Words in *italics* are used to refer to the sentencing factors through the rest of the section dealing with burglary.

The next step in the analysis was to identify the number of cases within the burglary dataset that contain different frequencies of mitigating or aggravating factors. These data are presented in Figure 2.11 below. 40.5% of burglary cases (4,566) involved one or more MFs, while 83.6% of cases (9,438) involved one or more AFs.

²³ This mitigating factor only appears in the guideline for aggravated burglary (not included in the dataset) but was nevertheless cited in nine cases of domestic burglary and two cases of non-domestic burglary.

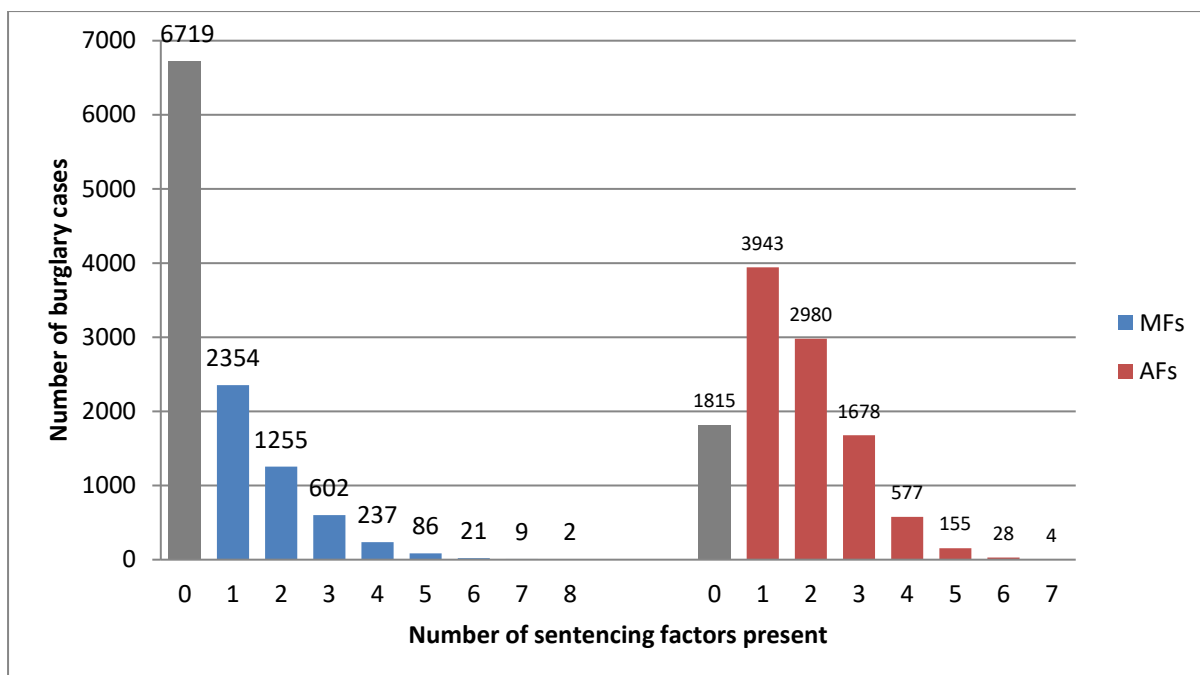


Figure 2.11. Number of burglary cases involving one or more MFs or AFs. The grey bars represent cases where either no MFs or no AFs are present.

MFs and AFs also frequently occur together in Crown Court cases. Figure 2.12 shows the distribution of burglary cases involving different numbers of MFs and/or AFs. Overall, 9.0% of cases involved no AFs or MFs, 50.5% of cases involved one or more AFs but no MFs, 7.2% involved one or more MFs but no AF, and 33.3% involved one or more MFs and one or more AFs. Amongst those cases where both AFs and MFs were present, 43.0% involved more AFs than MFs, 25.9% involved more MFs than AFs, and 31.1% had the same number of AFs and MFs present.

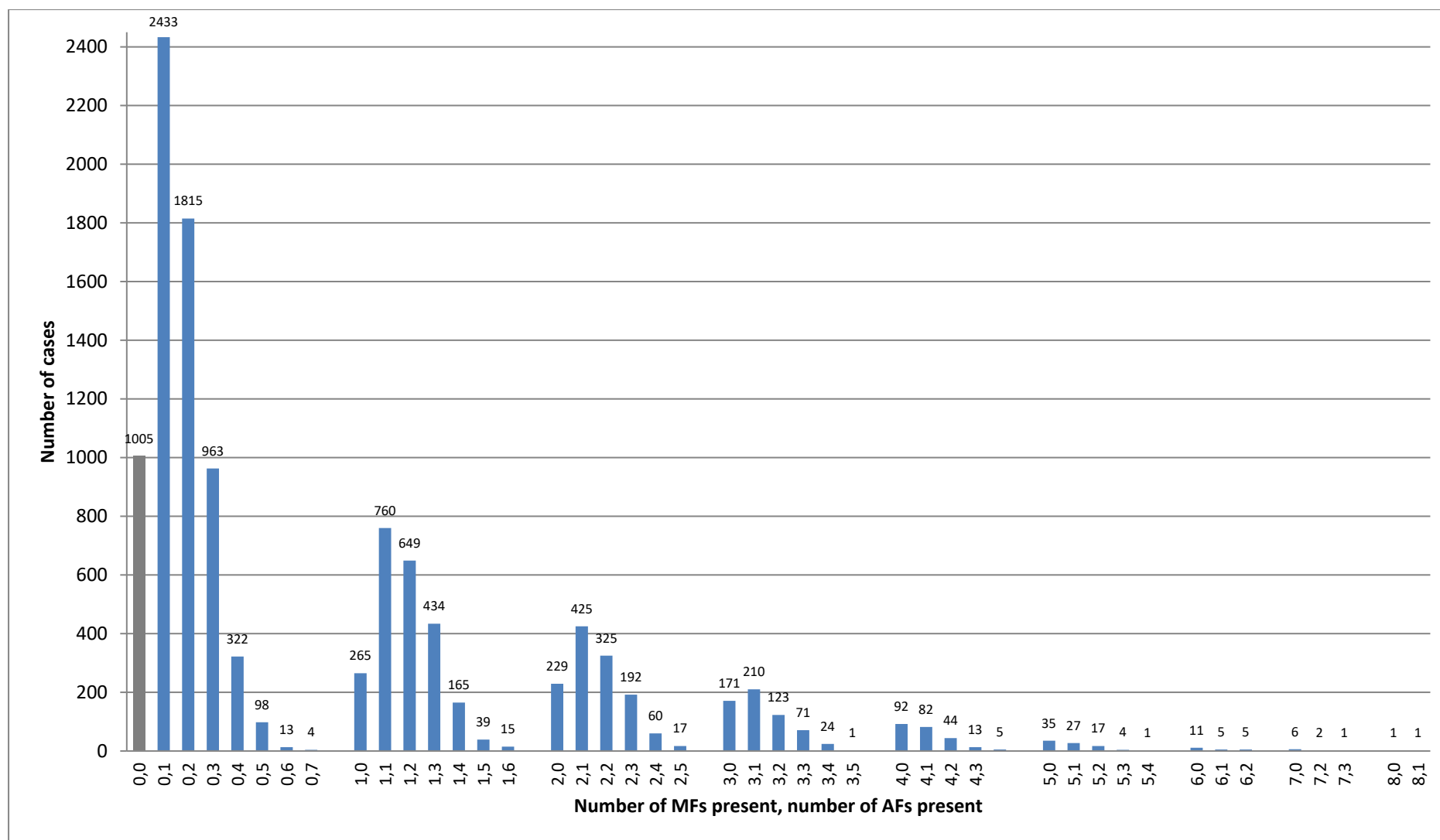


Figure 2.12. Number of burglary cases involving different combinations of MFs and AFs, organised by MFs. The first grouping represents 0 MFs + 0-11 AFs, in the format “MF#, AF#”; the second grouping represents 1 MF + 0-9 AFs; etc. The grey bar represents cases where no MFs or AFs are present.

The next set of analyses examined the distribution in the burglary dataset of the three selected PMFs that arguably reflect offenders' character, i.e. remorse, good character, and addressing addiction. First, crosstabs were used to examine the extent to which the three PMFs co-occur within the burglary dataset. Figure 2.13 shows that there is significant cross-over between the three PMFs: 64.6% of good character cases and 53.4% of addressing addiction cases also included remorse and 34% of remorse cases also included one or both of the other two PMFs.

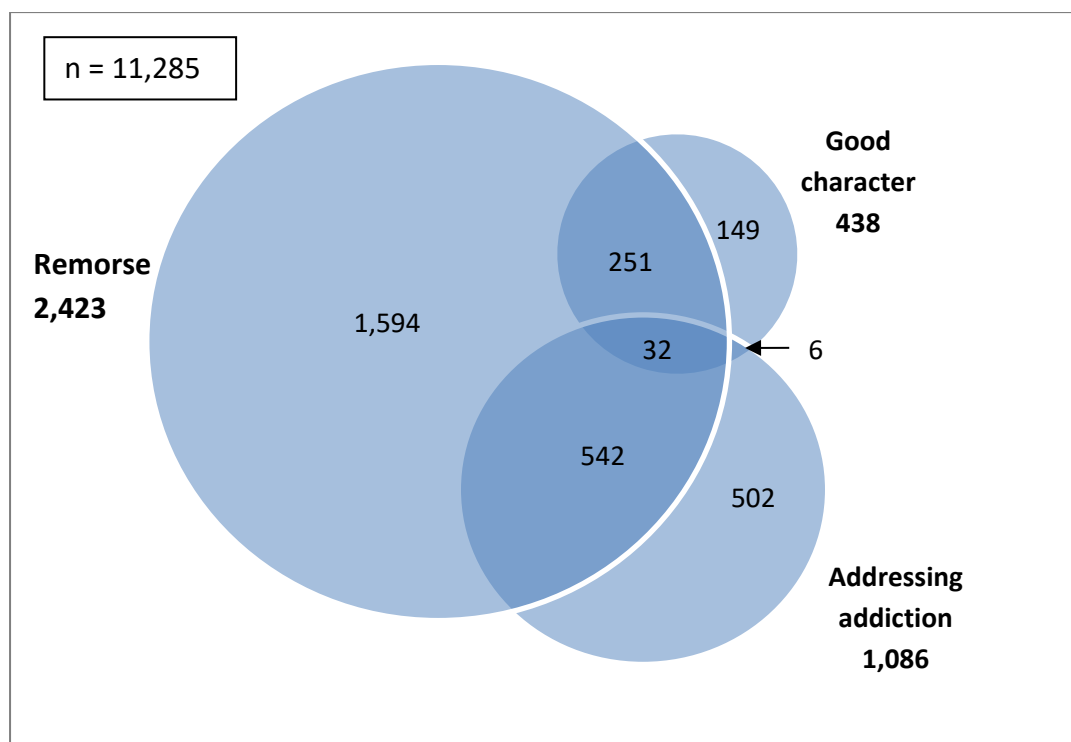


Figure 2.13. Venn diagram showing frequency of remorse, good character and addressing addiction across Crown Court burglary cases. Circle sizes and positions are approximate only.

Second, Figures 2.14 and 2.15 show the extent to which the three selected PMFs co-occurred in the burglary dataset with other MFs or with AFs. Remorse was relatively more likely to occur without other MFs than the other two PMFs. Both remorse and addressing addiction most often occurred with zero or one other MF, while good character was mostly likely to occur with two or three other MFs. As regards AFs, good character was much more

likely than the other PMFs to occur without AFs, with one or two AFs most likely for both remorse and addressing addiction.

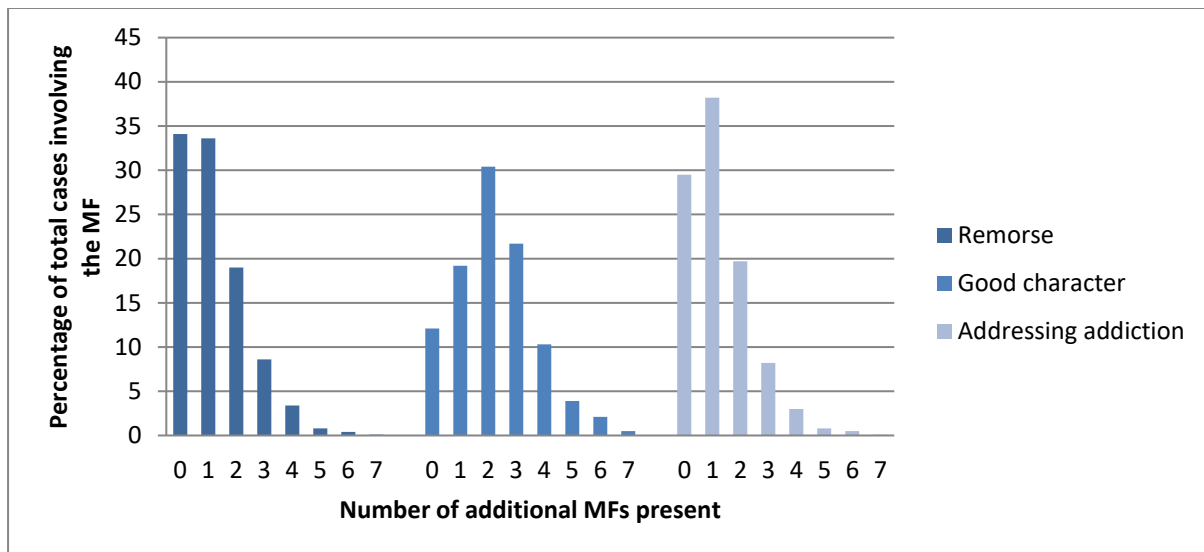


Figure 2.14. Co-occurrence of selected PMFs with other MFs in Crown Court burglary cases.

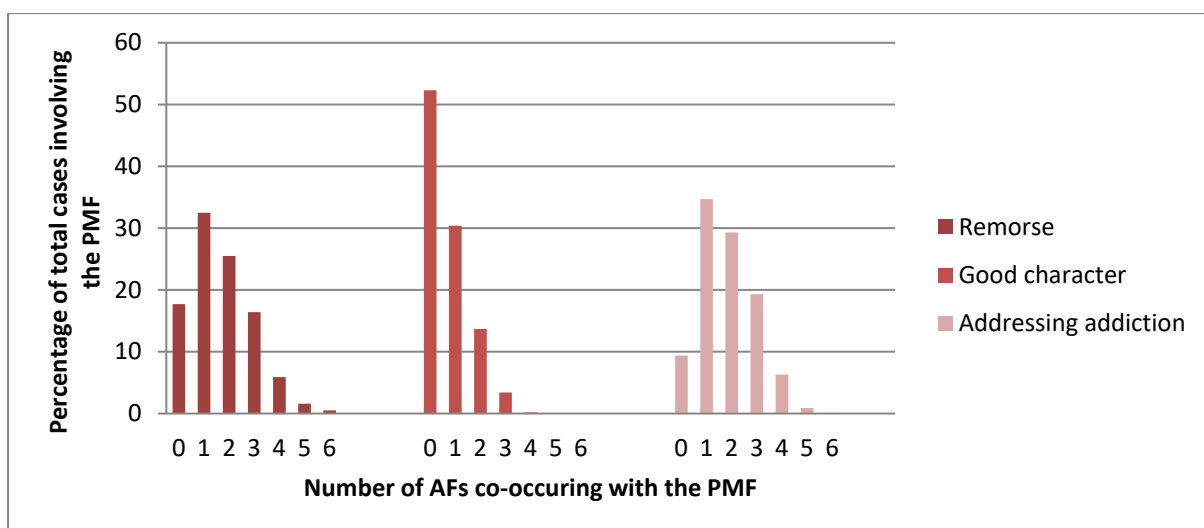


Figure 2.15. Co-occurrence of selected PMFs with AFs in Crown Court burglary cases.

2.7.2. Associations Between MFs and AFs and Sentencing Outcomes

After investigating the distribution of MFs and AFs within the burglary dataset, the study next examined the relationship between MFs, AFs and sentencing outcomes.

Sentencing options available for burglary are the same as for assault, namely custody

(immediate or suspended), a community penalty such as unpaid work and/or drug/alcohol rehabilitation, a fine, or a discharge. Across the burglary dataset, 74.2% of offenders received immediate custody, 16.5% received a suspended sentence, 8.7% received a community order, fewer than 0.1% received a fine, and 0.2% received a discharge²⁴. The burglary dataset used 11 of the 12 categories of custodial sentence length used in the assault dataset (there was no “life or indeterminate” category). The three most common sentence lengths in the dataset were over 18 months and up to three years (39.7%), over 12 months and up to 18 months (16.7%), and 12 months (9.8%). The chosen sentencing outcome for analysis was whether or not an offender received an immediate custodial sentence (discussed further above in reference to the assault dataset).

2.7.2.1. Presence of an MF, an AF or both. As with the assault data, the study first examined whether the presence of an MF or an AF predicts whether an offender will receive a custodial sentence. The study compared cases in the burglary dataset involving only one MF, one AF, or one MF and one AF with cases where no MFs or AFs were present. Figure 2.16 shows the percentage of immediate custody associated with each of the MF/AF combinations.

²⁴ 1.0% of offenders received a sentence that did not fall into any of the above categories.

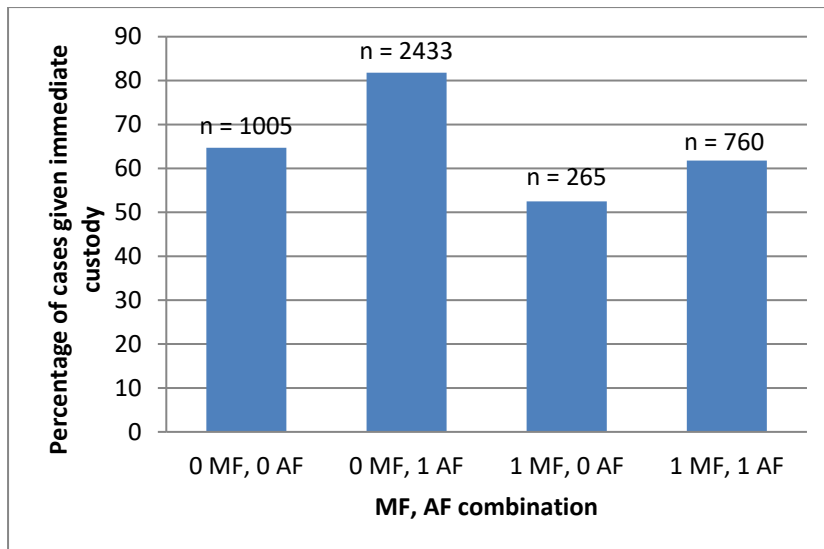


Figure 2.16. Percentage of burglary cases with differing MF and/or AF combinations that receive an immediate custodial sentence.

A two-way loglinear analysis for MF/AF combination and sentencing outcome (immediate custody or not) produced a model that retained all effects. The model's likelihood ratio was $\chi^2(0) = 0, p = 1$. The interaction between MF/AF combination and outcome was significant, $\chi^2(3) = 233.30, p < .001$. Odds ratios indicated that offenders were 1.67 times less likely to receive an immediate custodial sentence when one MF and no AF was present, compared to no MF or AF ($\chi^2(1) = 13.32, p < .001$). Where one AF and no MF was present, offenders were 2.46 times more likely to receive immediate custody, compared to no MF or AF ($\chi^2(1) = 117.56, p < .001$). When one MF and one AF were present, offenders were 1.14 times less likely to receive immediate custody than when no MF or AF was present but the difference was not statistically significant.

Figure 2.17 shows the percentage of immediate custody associated with each of the MF/AF combinations, broken down by the two specific offences contained in the burglary dataset.

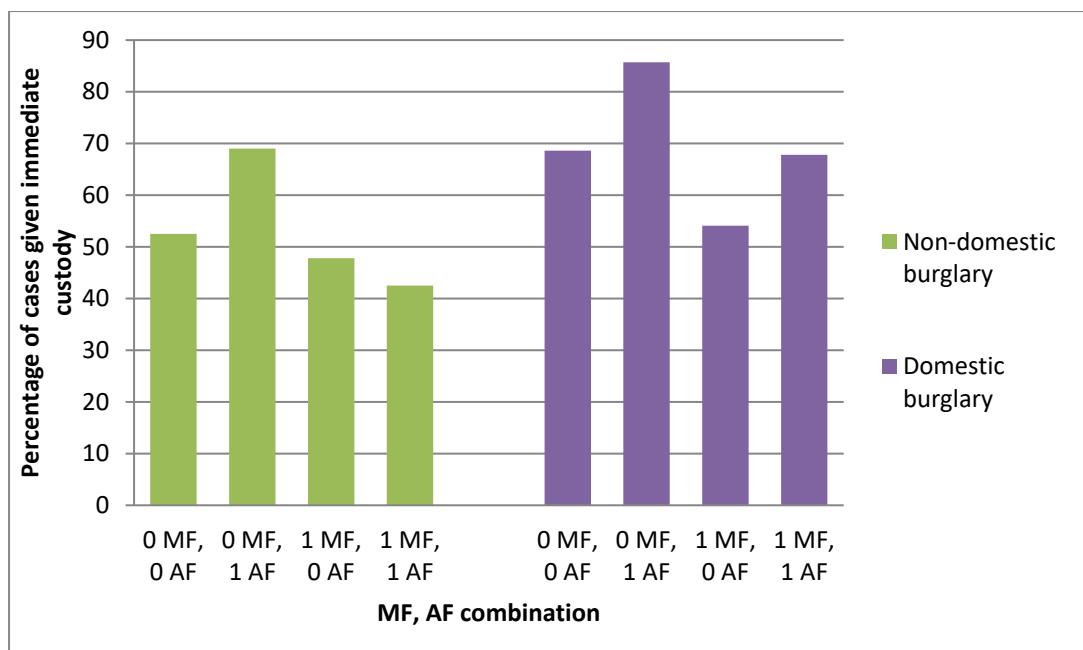


Figure 2.17. Percentage of cases with differing MF and/or AF combinations that receive an immediate custodial sentence, by specific burglary offence.

A three-way loglinear analysis including non-domestic burglary and domestic burglary, MF/AF combination and sentencing outcome (immediate custody or not) also produced a model that retained all effects. The likelihood ratio of this model was $\chi^2(0) = 0, p = 1$. The analysis indicated that the highest-order interaction (offence x MF/AF combination x outcome) was significant, $\chi^2(3) = 8.68, p = .034$. To break down this effect, chi-square tests for the MF/AF combination and outcome variables were performed separately for each offence and odds ratios calculated. Domestic burglary is considered a more serious offence than non-domestic burglary and, as one would expect, was associated with a higher likelihood of immediate custody ($\chi^2(1) = 208.01, p < .001$).

Odds ratios indicated that when one MF and no AF was present, offenders sentenced for non-domestic burglary were 1.19 times less likely to receive immediate custody, compared to no MF or AF, but the difference was not statistically significant, while offenders guilty of domestic burglary were 1.85 times less likely to receive immediate custody ($\chi^2(1) = 14.55, p < .001$). Where one AF and no MF was present, non-domestic burglary offenders

were 2.02 times more likely to receive immediate custody, compared to no MF or AF ($\chi^2(1) = 20.16, p < .001$) and domestic burglary offenders were 2.76 times more likely to receive immediate custody ($(\chi^2(1) = 102.40, p < .001)$). When one MF and one AF were present, offenders guilty of non-domestic burglary were 1.49 times less likely to receive immediate custody, compared to no MF or AF ($\chi^2(1) = 4.14, p = .042$) and offenders sentenced for domestic burglary were 1.03 times less likely to receive immediate custody, a difference which was not statistically significant.

2.7.2.2. Independent effects of individual MFs and AFs. Descriptive statistics for the percentage of burglary cases involving immediate custody that were associated with each of the step two MFs and AFs are included at Appendix 5. As with the assault dataset, a binary logistic regression was carried out to examine the extent to which individual step two MFs and AFs predict custodial sentences independent of the effects of all other step two MFs and AFs (and other relevant variables). The predictor variables were the step two sentencing factors listed in the burglary guidelines (see Table 2.6 above), coded as dummy variables (i.e., 1 = present, 0 = absent). The binary outcome variable was whether or not the offender received an immediate custodial sentence. Crosstabs confirmed that all step two MFs and AFs were significantly correlated with the outcome variable and so all were included in the logistic regression model.

Two other predictor variables were included in the regression model to control for their independent effects on sentence outcomes: specific burglary offence (a binary categorical variable comprising domestic burglary and non-domestic burglary, with non-domestic burglary being the reference category) and offence seriousness (a three-level categorical variable, with category 3 – the least serious category – being the reference category). Offence seriousness was included to capture the cumulative effect on sentence outcome of step one AFs and MFs. The model was found to be significantly different from a

constant-only model ($\chi^2(29) = 3513.738, p < .001$) and predicted 92.2% of immediate custody sentences and 54.0% of other sentences correctly, giving an overall success rate of 82.2%.

Residual statistics were examined (including Cook's distance, leverage, DFBetas and standardised residuals) and did not raise any concerns. Table 2.7 shows regression coefficients, standard errors, odds ratios, and 95% confidence intervals for the odds ratios for each predictor. The results for the three PMFs of interest (remorse, good character and addressing addiction) are marked in bold.

Table 2.8

Results from binary logistic regression of step two burglary MFs and AFs predicting immediate custody

Sentencing factor	<i>b</i>	Standard error	Exp(<i>b</i>) (Odds ratio)	95% C.I. for Exp(<i>b</i>)	
				Lower	Upper
Constant	-1.004	0.095	0.366		
Aggravating factors					
Previous convictions	0.945***	0.071	2.573	2.241	2.955
At night	0.394***	0.072	1.483	1.288	1.709
Under the influence	0.084	0.082	1.088	0.927	1.276
Current court orders	0.993***	0.105	2.699	2.199	3.313
On licence	1.384***	0.143	3.991	3.013	5.285
TICs	1.128***	0.143	3.090	2.335	4.089
On bail	0.767***	0.134	2.154	1.655	2.804
Child at home	0.593**	0.177	1.810	1.280	2.561
Abuse of power/trust	0.283	0.167	1.327	0.956	1.842
Community impact	0.512*	0.241	1.668	1.040	2.674
Victim compelled to leave	-0.169	0.328	0.844	0.444	1.605
Gratuitous degradation	0.883	0.509	2.417	0.891	6.557
Steps taken to prevent reporting	1.495*	.700	4.459	1.130	17.596
Mitigating factors					
Remorse	-0.488***	0.071	0.614	0.534	0.705
Addressing addiction	-1.594***	0.088	0.203	0.171	0.241

Nothing stolen	-0.627***	0.088	0.534	0.450	0.634
No previous convictions	-0.689***	0.101	0.502	0.412	0.612
Age and/or lack of maturity	-0.588***	0.103	0.555	0.454	0.680
Subordinate role	-0.906***	0.117	0.404	0.322	0.508
Good character	-.523***	0.142	0.593	0.449	0.784
Mental disorder	-0.924***	0.173	0.397	0.283	0.557
Sole or primary carer	-1.059***	0.197	0.347	0.236	0.510
Serious medical conditions	-1.190***	0.229	0.304	0.194	0.477
Lapse of time	-0.962***	0.253	0.382	0.233	0.627
Voluntary reparation	-1.104***	0.294	0.331	0.186	0.589
Injuries caused recklessly	-1.250	0.956	0.286	0.044	1.864
Specific offence					
Domestic burglary	0.926***	0.067	2.524	2.214	2.876
Seriousness					
Category 2	0.724***	0.069	2.064	1.802	2.364
Category 1	2.520***	0.101	12.429	10.205	15.138

Note. * $p < .05$ ** $p < .01$ *** $p < .001$. $R^2 = .308$ (Hosmer & Lemeshow), .298 (Cox & Snell), .436 (Nagelkerke).

Some sentencing factors that failed to reach statistical significance as predictors in the logistic regression may have done so because they occurred only rarely in the data. This was true of three AFs and MFs in the burglary dataset, namely *gratuitous degradation* (0.6%), *victim compelled to leave* (0.8%), and *injuries caused recklessly* (0.1%).

Figures 2.18 and 2.19 compare the odds ratio scores for each MF and AF from the logistic regression with the percentage of cases receiving immediate custody that are associated with each MF and AF. The figures for percentage of cases receiving custody are purely descriptive statistics of the kind published by the Sentencing Council in its annual CCSS reports (e.g., Sentencing Council, 2014) and therefore do not allow for the independent effects of other MFs and/or AFs or other variables such as offence seriousness that may co-occur with the MF or AF in question.

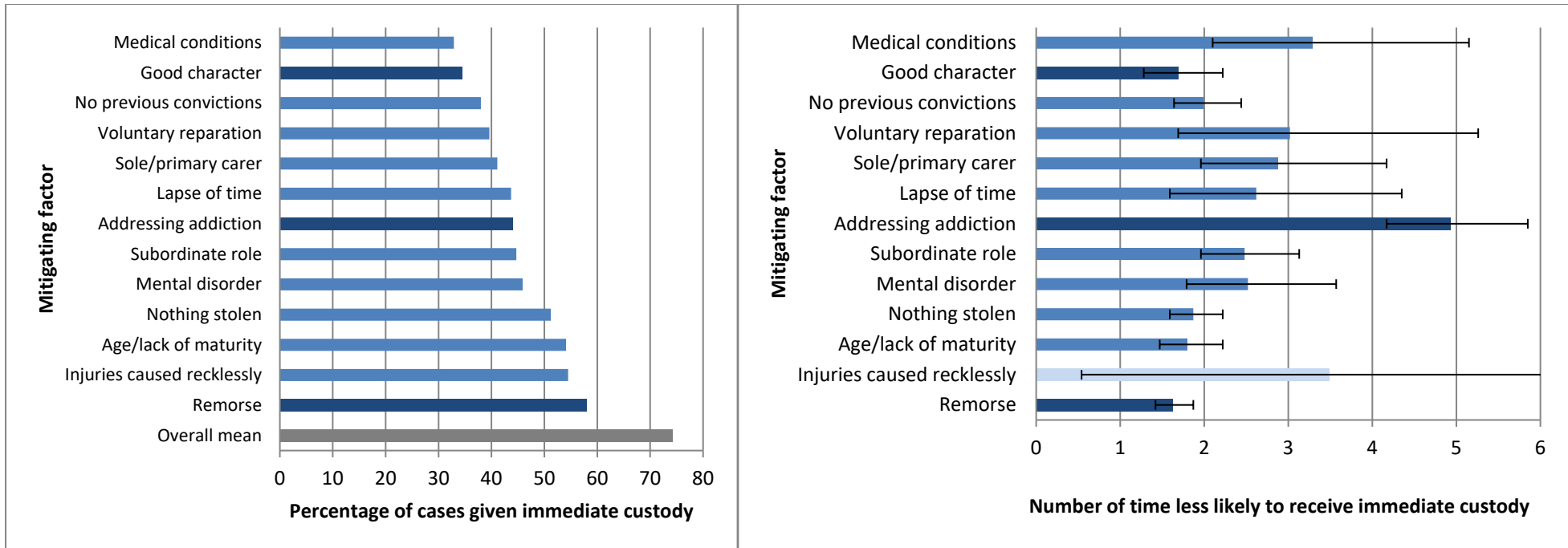


Figure 2.18. Percentage of cases given immediate custody that are associated with each MF in the burglary dataset (left-hand graph), compared to the number of times *less* likely an offender is to receive immediate custody if each MF is present, based on the results of a binary logistic regression (right-hand graph). Character-based PMFs are shaded dark blue. In the right-hand graph, error bars are 95% confidence intervals and non-significant results are shaded pale blue.

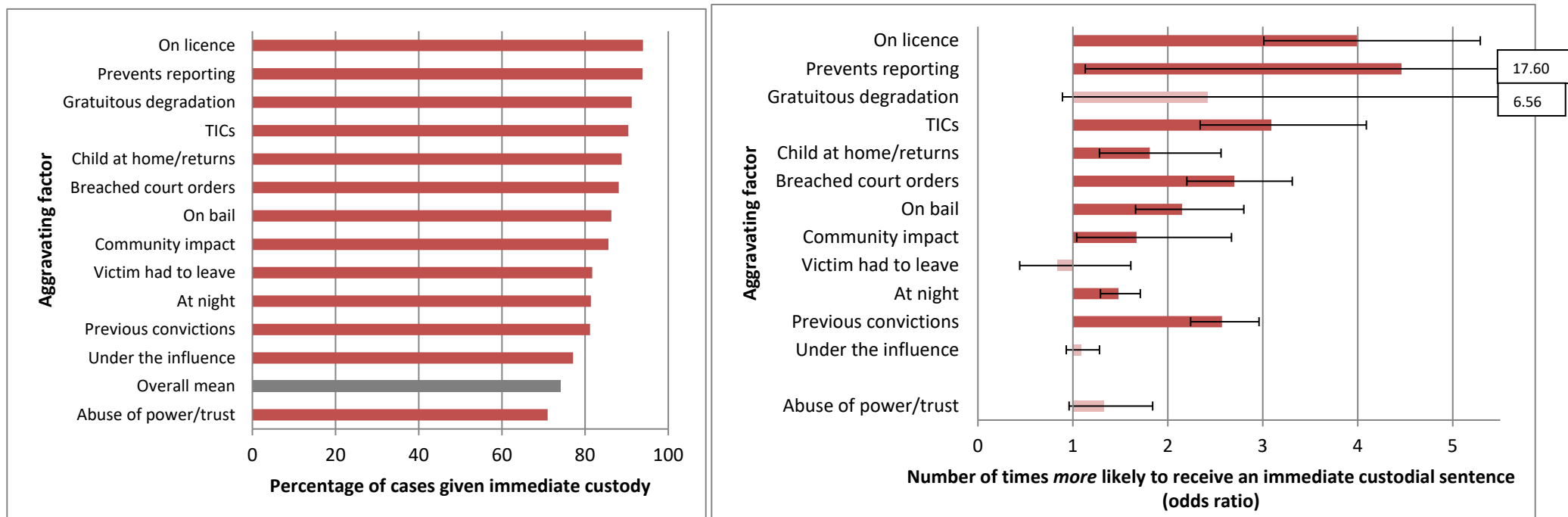


Figure 2.19. Percentage of cases given immediate custody that are associated with each AF in the burglary dataset (left-hand graph), compared to the number of times less likely an offender is to receive immediate custody if each AF is present, based on the results of a binary logistic regression (right-hand graph). In the right-hand graph, error bars are 95% confidence intervals and non-significant results are shaded pink.

2.7.2.3. Interactions between variables. A second binary regression model was run to test for several interactions between the predictor variables. In each case, a significant interaction indicates that the effect of one variable differs depending on the level of the other variable. First, interactions were examined between the three PMFs of interest (remorse, good character and addressing addiction). Second, the model tested for interactions between each PMF of interest and previous convictions. The third group of interactions tested was between each PMF of interest and domestic burglary (with non-domestic burglary being the reference category). The model was found to be significantly different from the model without interactions ($\chi^2(9) = 48.42, p < .001$) and predicted 93.0% of immediate custody sentences and 51.6% of other sentences correctly, giving an overall success rate of 82.2%. Table 2.8 shows regression coefficients, standard errors, odds ratios, and 95% confidence intervals for the odds ratios for each interaction term. The main effects of all of the predictor variables from the model presented in Table 2.7 were also included in the interaction model but are omitted from Table 2.8 for clarity.

Table 2.9

Results from binary logistic regression to examine selected interactions between variables predicting immediate custody

Interaction	<i>b</i>	Std error	Exp(<i>b</i>) (Odds ratio)	95% C.I. for Exp(<i>b</i>)	
				Lower	Upper
Remorse*Good character	0.067	0.286	1.069	0.610	1.874
Remorse*Addressing addiction	0.721***	0.177	2.057	1.453	2.911
Good character*Addressing addiction	1.020*	0.506	2.774	1.028	7.483
Remorse*Previous convictions	-0.211	0.152	0.810	0.601	1.091
Good character*Previous convictions	-0.199	0.602	0.819	0.252	2.668
Addressing addiction*Previous convictions	-0.601*	0.234	0.548	0.346	0.867
Remorse*Domestic burglary	-0.039	0.172	0.962	0.687	1.347
Good character*Domestic burglary	-0.585	0.340	0.557	0.286	1.086

Addressing addiction*Domestic burglary	0.304	0.213	1.355	0.892	2.057
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Note. * $p < .05$ ** $p < .01$ *** $p < .001$.

There was a significant interaction between remorse and addressing addiction. For cases that did not involve addressing addiction, an offender was 1.6 (1/0.628) times less likely to receive immediate custody if remorse was present than if it was absent. When addressing addiction was present as a factor, an offender was actually 1.29 times more likely to receive immediate custody if remorse was also present ($\exp(-0.466 + 0.721) = 1.29$). I.e., addressing addiction appears to reverse the effect of remorse as a mitigating factor. Similarly, when cases did not involve remorse, an offender was 5.4 (1/0.184) times less likely to receive immediate custody if addressing addiction was present than if it was absent. When remorse was present, an offender was only 2.6 (1/0.379) times less likely to receive immediate custody if addressing addiction was also present ($\exp(-1.692 + 0.721) = 0.379$). This is a difficult interaction to explain. It is the same pattern as was found in assault (each PMF weakens the other) but much stronger. It is almost as if judges discount both PMFs so much when they are present together that they end up reducing sentences by less than if only one of the PMFs was present in the case.

There was also a significant interaction between good character and addressing addiction. For cases that did not involve addressing addiction, an offender was 1.1 (1/0.882) times less likely to receive immediate custody if good character was present than if it was absent. When addressing addiction was present, an offender was 2.44 times more likely to receive immediate custody if good character was also present ($\exp(-0.126 + 1.020) = 2.44$). I.e., as with remorse, the presence of addressing addiction appears to reverse the effect of good character as a mitigating factor. For cases that did not involve good character, offenders were 5.4 (1/0.184) times less likely to receive immediate custody if addressing addiction was present than if it was absent. When good character was present, offenders were only 2.0

(1/0.511) times less likely to receive immediate custody if addressing addiction was also present ($\exp(-1.692 + 1.020) = 0.511$). Again, it is difficult to explain the reversal of good character as a factor. Perhaps the notion of being an addict cancels out the possibility in the judges' minds of the offender having a good character. The court may, therefore, tend to think less of an offender who pleads good character in these circumstances. The discounting issue described in relation to the interaction of remorse and addressing addiction may also apply here.

Finally, there was a significant interaction between addressing addiction and previous convictions. For cases that did not involve previous convictions, an offender was 5.4 (1/0.184) times less likely to receive immediate custody if addressing addiction was present than if it was absent. When previous convictions were present, an offender was 9.9 (1/0.101) times less likely to receive immediate custody if addressing addiction was also present ($\exp(-1.692 - 0.601) = 0.101$). This is similar to the interaction between good character and previous convictions in assault cases and the explanation may be the same: cases involving previous convictions are more likely to be on the borderline between custody and a community sentence, where the presence of a mitigating factor such as addressing addiction could have a more significant impact.

An interaction with previous convictions in the same direction was also found for both remorse and good character but the effects were smaller and did not reach statistical significance, and the 95% confidence intervals for their odds ratios included 1.

2.8. Comparison of Assault and Burglary Offences

The results obtained from the assault dataset were compared to those from the burglary dataset. This comparison focuses on the character-based PMFs, i.e., remorse, good character and addressing addiction. As Figure 2.20 shows, remorse and good character were

both much more prevalent in assault cases than burglary cases. The frequency of addressing addiction was very similar across the two offence types. In addition, addressing addiction co-occurred with remorse much more frequently in assault cases (71.2% of cases involving addressing addiction also involved remorse) than in burglary cases (53.5%). The co-occurrence of good character with remorse was relatively similar across assault cases (70.8%) and burglary cases (65.5%).

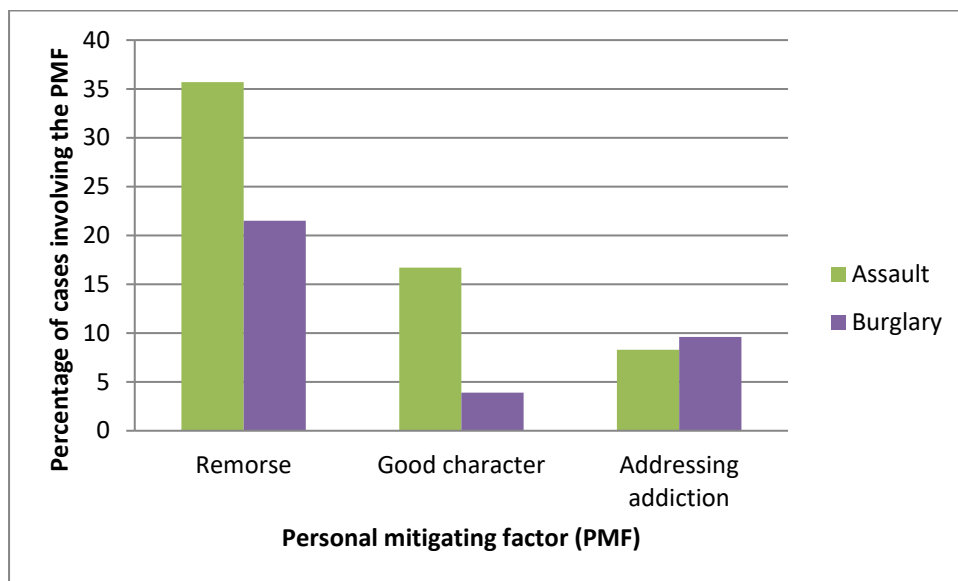


Figure 2.20. Percentage of Crown Court cases involving each of remorse, good character and addressing addiction, by offence category.

The logistic regressions suggested that addressing addiction had a weaker effect in assault cases (where offenders were 3.88 times less likely to receive custody), than in burglary cases (where offenders were 4.93 times less likely to receive custody). An opposite, although much weaker, pattern was found for remorse. Assault offenders showing remorse were 1.88 times less likely to receive immediate custody, whereas burglary offenders who showed remorse were only 1.62 times less likely to receive immediate custody. The results for good character were almost identical across the two offence types. See Figure 2.21.

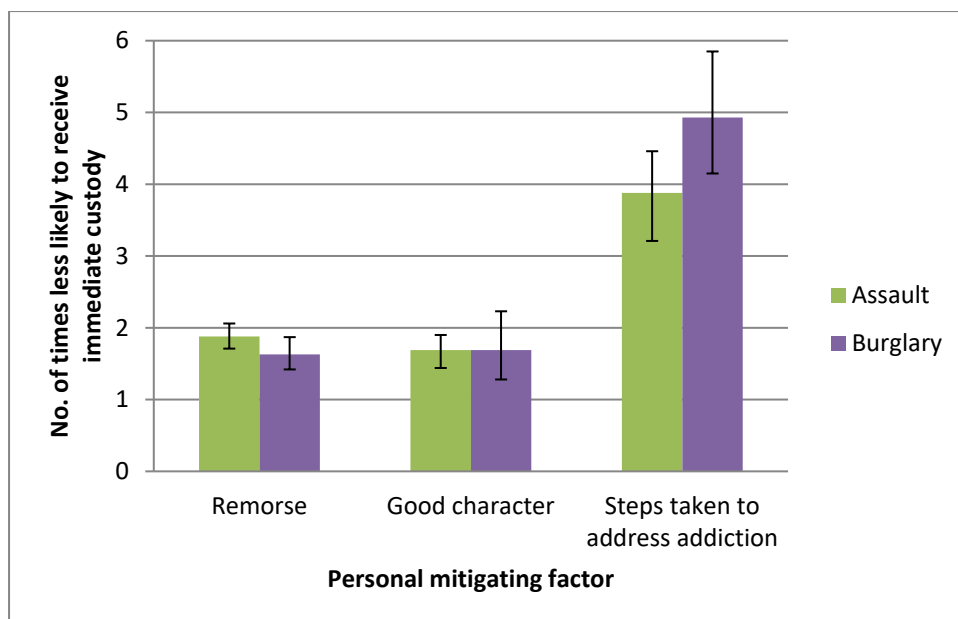


Figure 2.21. Number of times *less* likely an offender is to receive immediate custody if remorse, good character or addressing addiction is present by offence type, based on the results of a binary logistic regression. Error bars represent 95% confidence intervals.

The pattern of interactions between sentencing factors was also somewhat different between assault and burglary cases. In assault cases, there was a significant interaction between remorse and addressing addiction, with both PMFs having weaker predictive power when the other PMF was also present. However, there were no significant interactions between remorse and good character, or good character and addressing addiction. In addition, good character was found to be a stronger predictor when it co-occurred with previous convictions, and remorse was a weaker predictor for cases of GBH with intent than for cases of common assault.

For burglary, there was an interaction between remorse and addressing addiction in the same direction as for assault, but the effect was much stronger, actually reversing the mitigating effect of remorse. There were also two significant interactions found in the burglary dataset that were not present in the assault data. First, the presence of addressing addiction reversed the effect of good character in much the same way as remorse. Second,

addressing addiction (rather than good character) had a stronger mitigating effect in cases involving previous convictions.

2.9. Discussion

Multiple MFs and/or AFs frequently occur together in Crown Court cases sentenced from 2011 to 2013, with 80.0% of assault cases and 66.7% of burglary cases involving two or more MFs and/or AFs. For both assault and burglary offences, AFs were more common than MFs. The character-based PMFs that are the main focus of this study were found to co-occur frequently both with each other and with other MFs and AFs. In particular, it was relatively uncommon to find a case involving either good character or addressing addiction that did not also involve remorse. On the one hand, these findings highlight the importance of examining the effect of individual PMFs in isolation from the effects of other sentencing factors. On the other hand, the frequent co-occurrence of remorse, good character and addressing addiction emphasises the need to establish whether these factors interact with one another or are used in a purely additive manner.

The study found that across all the 31,530 assault and burglary offences studied, the presence of a single AF was associated with a higher chance of immediate custody (imprisonment). Conversely, while the presence of a single MF in cases of common assault, ABH and domestic burglary was associated with a lower chance of immediate imprisonment, one MF made no difference to cases of GBH, GBH with intent, or non-domestic burglary. For every offence studied, the association between an AF and an increased chance of imprisonment was stronger than that between an MF and a decreased chance of imprisonment. These findings suggest that cases involving one MF and one AF should be associated with a higher chance of imprisonment than cases where no MF or AF was present, because the

presence of an MF would not fully cancel out or compensate for the (stronger) effect of an AF.

However, the picture varied between offences. For ABH, GBH and GBH with intent, cases with one MF and one AF were, as expected, linked to a higher chance of imprisonment than cases with no MF or AF present. However, for common assault and domestic burglary, there was no difference between the two groups, and for non-domestic burglary, cases with one MF and one AF actually had a lower chance of resulting in immediate custody than cases with no MF or AF.

These apparently mixed findings could be explained partly by different combinations of single MFs and AFs being present across the different offences studied (e.g., some offences may have involved more cases where relatively weak AFs co-occurred with relatively strong MFs). For example, *addressing addiction*, the strongest MF predictor in both datasets, was much more prevalent relative to other AFs and MFs in burglary cases than in assault cases. Future research could explore whether the patterns of co-occurring AFs and MFs vary significantly between offences and offence categories.

All three of the character-based PMFs (i.e., remorse, addressing addiction, and good character) significantly predicted a reduced chance of offenders receiving custodial sentences. In terms of the relative impact of the three character-based PMFs, the binary logistic regression models showed a similar pattern across assault and burglary offences. In each dataset, addressing addiction most strongly predicted a lower chance of imprisonment, while remorse and good character were two of the weaker MFs (i.e., were only weakly associated with a reduced chance of immediate custody), particularly for burglary. Remorse was a slightly stronger MF than good character for assault but was weaker for burglary. The findings that addressing addiction had a strong mitigating effect, while good character had a

significant, but smaller effect, are broadly consistent with Jacobson and Hough's (2007) self-report study of 40 Crown Court judges. Jacobson and Hough found that sentencers ranked "motivated to get drug treatment" third out of 13 possible MFs and "respected individual", the closest MF in the study to good character, ninth out of 13 MFs. However, as discussed in Chapter 1, the findings from self-report studies may be unreliable in any case.

The findings for remorse were consistent with past statistical analyses of CCSS data. Remorse's weight as a mitigator in assault cases (an odds ratio of 0.53) was very close to Maslen (2015a)'s odds ratio of 0.50. For burglary, remorse's position as the least important of the 12 PMFs found to be significant predictors supports Irwin-Rogers and Perry's (2015) study of domestic burglary only, which found remorse to be the 11th most important factor, out of 12 (the precise odds ratios of these two studies cannot be compared since they used different types of logistic regression models). It appears that although remorse is the most frequently cited PMF in both assault and burglary cases (35.7% and 21.5% respectively), its impact on a case-by-case basis is generally limited.

The results are inconsistent with Jacobson and Hough (2007), who found that "intense remorse" was rated by judges as relatively important, fourth out of 13 MFs. However, unlike the CCSS studies (Irwin-Rogers & Perry, 2015; Maslen, 2015a), Jacobson and Hough's findings were based on self-report data. It should also be noted that "intense remorse" is a different variable from simple "remorse", and so the findings could not properly be compared for that reason.

Rarely occurring MFs often had relatively stronger predictive power in both offence categories studied. For assault, although *addressing addiction* was the strongest predictor of a non-custodial sentence, the next four strongest predictors were all low frequency MFs (under 5% of cases). For burglary, *addressing addiction* was also the strongest MF predictor, but the

next five strongest predictors were very low frequency MFs (under 2.5% of cases). For AFs, there was no general pattern of rarer AFs being stronger predictors. However, in both datasets the strongest AF predictors were very rare: for assault, attempt to conceal evidence (0.9%) was the strongest predictor, while for burglary, steps taken to prevent reporting (0.4%) was strongest. One explanation for the apparent association between rarity of occurrence and predictive power may be that it is an instance of vividness bias. Vividness bias is a product of the availability heuristic (Tversky & Kahneman, 1974), and predicts that people give “inferential weight to information in proportion to its vividness” (Nisbett & Ross, 1980, p. 62). In the present context, very rare sentencing factors are more vivid (i.e., stand out more) and are therefore given relatively more weight by sentencers than commonly occurring factors such as remorse or previous convictions.

The present study identified some interactions between the three character-based PMFs. No previous sentencing study has identified interactions between MFs. The results suggest that remorse and addressing addiction each have less impact when they occur together in both assault and burglary, and good character and addressing addiction have less impact when they co-occur in burglary. In other words, when these PMFs co-occur, sentencers tend to underweight each factor compared to the value given to that factor when it occurs alone. The underweighting of multiple PMFs is particularly striking in burglary, where the presence of addressing addiction actually seems to reverse the mitigating effect of both remorse and good character. Somewhat surprisingly, some PMFs appeared to have a stronger mitigating effect for offenders with previous convictions. This may be because cases involving previous convictions are more likely to be on the threshold between custody and a non-custodial sentence, where PMFs have been observed to have a particularly strong influence in favour of a non-custodial sentence (Hough et al., 2003; Jacobson & Hough, 2007; Millie et al., 2007).

There is evidence in the CCSS data for some differences in the weight sentencers give to PMFs in assault and burglary offences, notably the increased importance attached to addressing addiction and somewhat reduced effect of remorse in burglary cases, compared to assault cases. It could be, for example, that strongly felt remorse is more typical of violent offenders than burglars (viz. also the much higher prevalence of remorse in assault cases). The observed differences between assault and burglary could also relate in part to differences in the profile of “typical” assault offenders versus “typical” burglars. For example, burglary is viewed as often being a “professional” offence (Brookman, Maguire, Pierpoint, & Bennett, 2010; Davies & Tyrer, 2003); if this is in fact correct, there are likely to be more career criminals involved in burglary than assault. This would explain the much higher frequency of previous convictions and much lower levels of remorse and good character amongst burglars than amongst assault offenders. It is less clear why an offender taking steps to deal with drug or alcohol addiction or other offending behaviour should matter more in the context of property crime. Sentencers may be more alert to burglars trying to deal with an addiction, since it is recognised that property crime is often related to drug dependency (Hayhurst et al., 2013; Jacobson & Hough, 2007; Pierce et al., 2015; Sentencing Advisory Panel, 2010).

Lastly, the findings for both assault and burglary support Maslen’s (2015a) finding of no interaction between remorse and previous convictions. It seems that, contrary to the intuitively appealing idea that an expression of remorse would be less plausible as a PMF for repeat offenders, the effect of remorse remains constant whether an offender has previous convictions or not.

2.9.1. Implications

On the most basic level, the results confirm that almost all of the MFs and AFs specified in the guidelines for assault and burglary are used in the way intended by the

guidelines. MFs reduce the chance of an offender going to prison, while AFs increase the chance of that offender going to prison.

The present study adds to the body of empirical evidence about the use of PMFs (and other MFs and AFs) in current sentencing practice. Researchers such as Dhimi (2013a, 2013b), Roberts (2008, 2011) and Young and King (2011) have proposed moving beyond unweighted lists of MFs and AFs and towards guidance on the typical weight that each MF and AF might be given across different offences. Alternatively, Irwin-Rogers and Perry (2015) suggest that sentencing guidance could give examples of circumstances where each factor is likely to be particularly important or unimportant for sentencing. An example of this already exists in the new guideline for sexual offences, which states in relation to rape, that “in the context of this offence, previous good character/exemplary conduct should not normally be given any significant weight” (Sentencing Council, 2013c, p. 11). A final possible model is the recently introduced Chinese sentencing guidelines, which include proposed ranges for percentage reductions to be given if a certain mitigating factor is present (e.g., a reduction of up to 50% can be given for a confession, depending on the degree to which the offender expresses repentance – Roberts & Pei, 2016).

If the Sentencing Council does decide to produce guidance on the use of MFs and AFs in sentencing, the present study’s findings could be used to help ensure that the guidance properly reflects current sentencing practice. Alternatively, policy-makers may decide that aspects of current practice could or should be changed to improve the sentencing process.

More specifically, this study raises several questions that should be addressed as part of any guidance development process. For example, should AFs have a greater impact on sentences than MFs, on average? If an offender shows genuine remorse, should that only have a weak mitigating effect on his or her chances of going to prison, and should it matter

less than if he/she is taking steps to deal with a drug or alcohol addiction? Should good character be an MF at all, given that many sentencing experts view it as inappropriate moral accounting (e.g., Ashworth, 2010; Maslen & Roberts, 2013)? How might we reduce the risk that rarely occurring MFs and AFs may have an inappropriately strong effect on sentencing judgments?

Another interesting question stems from the underweighting that appears to occur when certain PMFs are present together in cases. This is at odds with the authority on sentencing law, David Thomas, who argued that the presence of one mitigating factor “will enhance the significance of another” and that “the weight of a combination of mitigating factors will usually be greater than the sum of their individual values (Thomas, 1979, p. 194). Psychological research suggests that underweighting of multiple PMFs is likely to be the result of sentencers taking a holistic rather than additive approach to personal mitigation, i.e., viewing an offender’s case in the round rather than identifying the individual PMFs present and then reducing the sentence by a certain amount for each factor.

Tversky and Koehler (1994) observed that when making probability estimates, people tend to judge the probability of the whole to be less than the probabilities of its constituent parts (the “subadditivity effect”). For example, participants in one study estimated the probability of death from heart attack in the USA as 22%, the probability of death from cancer as 18% and the probability of death from other natural causes as 33% (a total of 73%). However, participants asked to judge the probability of death from any natural cause estimated it at only 58%.

A common application of the subadditivity effect to estimation of numeric amounts is the planning fallacy, the tendency to underestimate the time (and cost, if relevant) needed to complete a task (Kahneman & Tversky, 1979). The planning fallacy can typically be reduced

by decomposing a task into sub-tasks and then estimating the time required for each sub-task (Kruger & Evans, 2004). Similarly, if judges consider an offender's mitigation holistically, their valuation of that mitigation is likely to be lower than if they estimate a separate value for each PMF and then add them to generate an overall value. The notion of judges taking a holistic approach to personal mitigation is consistent with psychological theories of legal decision-making which propose that people construct a satisfying, consistent whole narrative for a case rather than focusing on the constituent parts (e.g., Pennington & Hastie, 1986, 1992; Lagnado, Fenton, & Neil, 2013; Simon, Snow, & Read, 2004).

The practical question that stems from the finding of underweighting is whether each individual PMF should have a set value (or range of values) and be combined additively with other PMFs to reach a total mitigation value. Or, could it be acceptable, or even preferable (in some or all circumstances), to view multiple related PMFs in the round, as part of a holistic assessment of the individual offender, and decide upon a fair overall valuation of personal mitigation for that case which may be lower (or higher) than the sum of the individual factors involved? If the goal is to avoid subadditivity, then a more structured approach to PMFs may be required. Systematic subadditivity could lead to offenders being imprisoned unfairly if their case lies on the borderline between custody and a community sentence and involves several PMFs.

More generally, the interactions found between PMFs and AFs supports the idea that judges' use of sentencing factors is nuanced and context-dependent, rather than blandly, mechanistically additive. This study was focused on three particular PMFs, and so it only examined interactions between those three PMFs (plus previous convictions), out of the more than 50 total MFs and AFs contained in the CCSS data sets for assault and burglary. There are many other interactions that can be explored and interpreted within the CCSS data.

Lastly, the present study suggests that the Sentencing Council should rethink the way that they present data from the CCSS. Several of their annual reports (e.g., Sentencing Council, 2014, 2015a) include descriptive statistics that associate particular MFs with certain imprisonment rates and average custodial sentence lengths. However, the picture painted by the logistic regressions carried out in this study is very different from the descriptive statistics (see Figures 2.9-2.10 and 2.18-2.19 in the present study). While the impact of remorse is relatively weak across both descriptive and inferential statistics, the logistic regression models reveal the actual importance of addressing addiction as an MF for both assault and burglary, while also showing that good character is a much less important MF than it would appear based on descriptive statistics alone. Figures 2.5, 2.6, 2.14 and 2.15 in the present study suggest that the apparent importance of good character may be partly because it occurs very often without an AF and often with two or more other MFs. On the other hand, addressing addiction is the most likely of the three PMFs to occur with one or more AFs in both assault and burglary. In summary, the contrast between the results of the logistic regression models and the descriptive imprisonment likelihood statistics suggests that existing Sentencing Council figures about the impact of AFs and MFs on sentence outcomes are inadequate and potentially misleading and should be revisited.

2.9.2. Proposals for Future Research

The methodology used here for assault and burglary could be replicated to cover all of the offence categories covered by the CCSS data. It would then be possible to draw comprehensive conclusions about the use of PMFs (and AFs) in current sentencing practice, and also compare across a full range of offences. It would also be interesting to explore further possible interactions between AFs and MFs in the datasets. Additionally, the CCSS datasets could be used to examine whether the use of AFs and MFs in assault and burglary in

the Crown Court changed during the three years from the introduction of guidelines for those offence categories.

PMFs are complex variables and sentencing is a complex human process. The CCSS data can tell us how PMFs are used in sentencing, but it cannot tell us why – for example, why one PMF is more influential than another, why a PMF may matter more for one type of offence than another, or why two PMFs may each be less important when they occur together. In order to answer questions of this kind, it will be necessary to explore what each of the character-based PMFs means to sentencers; how they perceive and understand them, and how those perceptions contribute to the sentencing process. Study 2 in this thesis has been designed to investigate these issues further.

2.9.3. Strengths and Limitations

There were some limitations to the present research. The study did not, and could not, include every potentially relevant factor that may affect Crown Court sentencing practice. For example, it only dealt with sentencing factors that are listed at step two of the England and Wales sentencing guidelines. In addition, the study could only take account of factors recorded in the CCSS datasets. Inevitably, there will have been other, unrecorded factors that may have influenced particular cases in one way or another. These unrecorded factors could not be included in the logistic regression models, which is likely to have reduced the accuracy of the resulting coefficients. Nevertheless, the models did correctly predict a high percentage of case outcomes overall: 80.8% of assault cases and 82.2% of burglary cases. In other words, the models represented the data relatively well.

The study also had to rely on the information that is recorded on the CCSS forms. CCSS forms are themselves self-report data, and as such may reflect the perception of the judge or judicial officer about each case, rather than recording the actual decision making

process. However, the CCSS forms only indicate which factors were considered in any given case, and the influence of those factors on sentencing outcomes was estimated statistically rather than relying on judges' self-reported estimates of the weights given.

Additionally, all three of the character-based PMFs studied are not entirely binary variables: in any given case, remorse could be relatively heartfelt or superficial, good character could involve a single incident or a lifetime of good works, and addressing addiction could be very preliminary or illustrate a significant commitment to behavioural change. The analysis carried out in this study therefore necessarily oversimplified the operation of these PMFs in practice by identifying simply whether they are present or absent in a case. Lastly, binary logistic regression is a correlational approach. As such, while it provides a good indication of the likely impact of sentencing factors on whether an offender receives immediate custody, it cannot confirm the presence of causal links. Differences in sentencing outcome predicted by the presence or absence of particular factors may be partly the result of other, unobserved variables.

As well as addressing its limitations as described above, Study 1 also had several strengths. The study used statistical analysis of very large data sets across multiple years to generate new and interesting empirical findings about the weight given to the PMFs remorse, addressing addiction, and good character in current sentencing practice. Unlike past studies, the analysis controlled for all PMFs and AFs included in Step 2 of the guidelines, as well as two measures of offence seriousness. It was the first study to compare directly the effect of remorse, addressing addiction, and good character on sentencing outcomes, the first to explore interactions between PMFs, and the first to find evidence that underweighting of multiple co-occurring PMFs may be an issue for sentencers.

3. Study 2

Sentencers' Perceptions of Character-based PMFs

3.1. Introduction

Study 1 in this thesis examined the extent to which the three character-based PMFs, i.e., remorse, good character, and addressing addiction, predicted non-custodial sentences in the Crown Court (reported in full in Chapter 2). The study used logistic regression modelling to analyse data from the Crown Court Sentencing Survey (CCSS) for 20,245 cases of assault and 11,285 cases of burglary. It was found that for both assault and burglary cases, when any of the three character-based PMFs was present, an offender was more likely to receive a community sentence or a fine and less likely to receive immediate custody. Addressing addiction was a stronger predictor of non-custodial sentences than either remorse or good character. There was also some evidence that the PMFs interacted. For example, both remorse and addressing addiction were weaker predictors of non-custodial sentences when both were present together in a case, than when they were present individually.

However, PMFs are complex, nuanced variables and sentencing is a complex cognitive and social process. The CCSS data can tell us the impact PMFs have on sentencing outcomes, but it cannot tell us *why*. Study 1's findings do not tell us anything about how sentencers understand the three character-based PMFs: how do they decide whether they are present or not, and to what extent? In addition, there is only limited value in measuring a variable if you do not possess a reliable definition for that variable. For example, it is no good a researcher reporting that good character reduces the likelihood of a prison sentence if it is not clear what good character means – what it consists of – in practice. It is not self-evident. The current England and Wales guidelines leave PMFs undefined and therefore open to

judges' subjective interpretation (Dhimi, 2013a). Bagaric (2014) argues that "there is not even a loose consensus" regarding the interpretation of most mitigating and aggravating factors, and this view is supported by empirical findings of widespread inconsistency in sentencers' treatment of personal mitigation (Raynard, Heberton and Pease, 1994; Jacobson & Hough, 2007; Lock, 2015). In addition, Study 1 necessarily reduced the PMFs studied to binary variables, and so the complexity and subjectivity of these variables was lost as a result.

3.1.1. Questions About PMF Use Raised or Unanswered by Study 1

The following questions about the role of PMFs in sentencing judgments were either raised by Study 1's findings, or left unanswered:

1. What do the three character-based PMFs mean in practice? This includes exploring the kinds of evidence that judges look for when evaluating whether a given PMF is present or not. What counts as remorse, good character, or addressing addiction, and what does not?
2. Why is addressing addiction such a powerful PMF, and why are remorse and good character relatively weak mitigators?
3. Why do sentencers underweight PMFs such as remorse and addressing addiction when they co-occur with another PMF in the same case?
4. What factors may influence the relationship between character-based PMFs and choice of sentence type – especially custody versus a community penalty?
5. Why does the effect of PMFs on sentencing outcomes remain largely constant across violent and property offences – what might this tell us about the way that sentencers

approach PMFs? Do they simply have a uniform approach to personal mitigation, or are there other factors (not examined in Study 1) that are more of a focus for sentencers than offence type?

3.1.2. Choice of Methodology

Answering questions 1-5 above involves looking for previously un-examined variables of interest that may be involved in the process of personal mitigation. Such variables cannot be generated through quantitative research, and there is insufficient past research to identify variables for inclusion in quantitative designs. A pragmatic alternative is to learn more about the experiences of the people who make the sentencing judgments, in the hope of identifying possible explanations for the quantitative findings that can then be developed and tested in future research. In addition, gaining a deeper understanding of sentencers' experiences of dealing with personal mitigation can help inform future guidance, for example by anticipating likely sources of resistance to guidance and designing materials in a way that sentencers will understand and find both accessible and useful.

The present study therefore chose to use a qualitative methodology. Qualitative research can explore individuals' perceptions and experiences – the meanings they give to objects and concepts – in a rich, nuanced way that quantitative research cannot (Willig, 2013). Using qualitative research as a follow-up to quantitative research has been described as a “sequential explanatory” approach (Cresswell & Plano Clark, 2011; Hanson, Cresswell, Plano Clark, Petska, & Cresswell, 2005). The first step in sequential explanatory research is to collect and analyse a set of quantitative data. The quantitative findings are then used to guide subsequent qualitative research. The purpose of the qualitative research is to clarify the quantitative findings – adding context and depth to the findings – but also to critique them (Silverman, 2011; Trahan & Stewart, 2013; Yardley & Bishop, 2008). For example, the

qualitative findings may raise inconsistencies or highlight exceptions – qualifying, rather than just clarifying, the quantitative results.

Two recent studies illustrate the benefits of a sequential explanatory approach to sentencing research. Jeffries and Bond's (2009) statistical analysis of Australian sentencing outcomes found evidence that Indigenous offenders were less likely than their non-Indigenous counterparts to be sentenced to prison. This finding was initially surprising given past research had found the opposite effect. However, Jeffries and Bond (2010) noted that the detail of offenders' sentencing stories, for example of abuse or victimisation, was partially lost through being reduced to binary variables for quantitative analysis. The authors therefore followed up their statistical analysis with a qualitative study based on thematic analysis of sentencing transcripts. The study found that Indigenous and non-Indigenous offenders' sentencing stories differed in various ways that may explain the discrepancy in sentencing outcomes. For example, Indigenous offenders were more frequently identified as having suffered childhood trauma, which may have led to reduced evaluations of blameworthiness and therefore reduced sentences.

Jeffries and Bond's (2010) qualitative research therefore identified variables (such as childhood trauma) that were not included in their original study but it appears may influence sentencing outcomes. These variables could be included in future statistical analysis or tested experimentally to determine the extent to which they may account for the finding of leniency towards Indigenous offenders. The qualitative study also provided richer, fuller data about the nature of Indigenous childhood experiences and their relationship to offending that could be useful for other purposes.

Stewart and Trahan (2012) carried out a logistic regression to estimate the relationship between the hostility of prosecution and defence lawyers, as perceived by US capital trial

jurors, and the likelihood of jurors giving life sentences. Perceived hostility was found to be counter-productive to both prosecution and defence lawyers. However, this finding was of limited value without an understanding of which actions might lead to perceptions of hostility. Stewart and Trahan (2012) therefore also carried out a thematic analysis of 1,198 juror interviews. They discovered, for example, that while jurors expected lawyers to be forceful in presenting their cases, when they engaged in personal attacks on opposing lawyers and/or their witnesses, this crossed the line into hostility and was perceived negatively.

As with Jeffries and Bond (2010), Stewart and Trahan's (2012) qualitative analysis revealed additional variables which could be used to help explore the quantitative findings further. Jurors' expectations about lawyers' behaviour and their response to personal attacks against opposing lawyers and/or their witnesses could be tested quantitatively to establish whether they influence jurors' perceptions of hostility (which in turn affect their sentencing judgments).

Another reason for supplementing quantitative research with qualitative research, i.e., using a "mixed methods" approach, stems from more practical considerations. The perspective on mixed methods research adopted by the present study is ultimately informed by the principles of pragmatism (Feilzer, 2010; Maxcy, 2003). From a pragmatic perspective, a research methodology should ultimately be evaluated in terms of its ability to achieve the researcher's goal (Johnson & Onwuegbuzie, 2004; Trahan & Stewart, 2013; Yardley & Bishop, 2008). To quote Trahan and Stewart (2013, p. 59), "the divide between qualitative and quantitative research limits our ability to reach a cohesive understanding of crime and criminal justice in the 21st century. Mixed methods research can circumvent this impasse". In the present case, combining quantitative and qualitative data can be justified on the basis that it will best allow this PhD research to achieve its ultimate research goal of understanding more about the influence of PMFs in criminal sentencing.

3.1.3. Past Research on Sentencers' Perceptions of PMFs

To date, there has been very little qualitative research on sentencers' perceptions of personal mitigation in general or character-based PMFs in particular. The following studies are all reviewed in more detail at pp. 38-50 of Chapter 1 but are summarised here for convenience.

3.1.3.1. Remorse. Hough, Jacobson and Millie (2003) and Millie, Tombs and Hough (2007) both reported that sentencers were generally sceptical about remorse, and concerned with distinguishing between “truly repentant” offenders and those who were just “sorry they were caught”. Gelsthorpe and Loucks (1997) found that magistrates mostly stated they assessed remorse based on the appearance of the defendant in court and their own gut feeling, while Jacobson and Hough's (2007) participants were reportedly more concerned with demonstrations of remorse such as a guilty plea (a claim of remorse “cannot logically proceed from a plea of not guilty” – Jacobson and Hough, 2007, p. 44)), letters to the court and/or reparation attempts. Hough, Jacobson and Millie (2003) found that sentencers associated remorse with the perception that an offence was a one-off “moment of madness” that would not be repeated.

3.1.3.2. Good character. Only Jacobson and Hough (2007) report any findings about good character. The authors appear to use the term “good character” to mean no previous convictions – although they do not say this explicitly. They distinguish this from positive good character (also referred to elsewhere in the report as “has led a productive/ worthwhile life”). Jacobson and Hough mention positive good character only briefly, noting that it is “sometimes rewarded by the sentencer” (p. 31). Examples given of evidence for positive good character include having a military record or a good employment record. The authors argue that good character can make the difference between prison and a community sentence,

citing a typical example given by one judge of a man with no previous convictions and steady employment who goes out drinking and gets into a fight. In such a case, the offence is likely to be viewed as a “blip”, and a prison sentence would therefore be “counter-productive”.

3.1.3.3. Addressing addiction. Jacobson and Hough (2007, p.33) – the only researchers to mention addressing addiction – conclude somewhat vaguely that it is “perhaps the most significant” of any mitigating factor but they provide very little qualitative evidence to support this assertion, other than noting that the factor is “often viewed as ‘taking a chance’ on a possibly deserving defendant”. The authors also argue that addressing addiction only applies to decisions about sentence type, in particular custody versus non-custody.

3.1.3.4. Other findings. Past research did not explore sentencers’ perceptions of the relationship between personal mitigation and offence type, although Hough, Jacobson, and Millie (2003), Jacobson and Hough (2007), and Millie, Tombs and Hough (2007) all identified a tendency among sentencers to emphasise the role of personal mitigation in offences that fall on the borderline between custody and community or suspended sentences (examples being relatively minor assaults or burglary). Jacobson and Hough (2007), however, do mention briefly the particular relevance of addressing addiction for property crime linked to drug dependency. Researchers found some evidence for sentencers perceiving personal mitigation as a holistic process involving an intuitive assessment of the whole offender, rather than adding individual factors together. Hough, Jacobson and Millie (2003, p. 39) concluded from their interviews that sentencers viewed mitigation as “as a value-laden process of constructing the narratives of the lives of the people in the dock”. Many of Jacobson and Hough’s (2007) participants referred to mitigation as “‘experience or feeling’ or ‘gut feeling’ rather than careful calculation” (Jacobson & Hough, 2007), which the authors viewed as “inevitable” given the subjectivity of PMFs such as remorse and addressing addiction.

Finally, both Raynard, Hebenton and Pease (1994) and Jacobson and Hough (2007) found evidence for substantial variation in the way that sentencers perceive PMFs. In addition, Lock's (2015) report for the Sentencing Council, evaluating the impact of the current sentencing guideline for assault offences, concluded that "some variation in approach remains. This seemed to be due to the wording and differing interpretation of certain factors" (Lock, 2015, p. 13).

Overall, these studies provide some insights into what may be behind the impact of character-based PMFs on sentencing judgments, as well as raising some other relevant issues relating to sentencers' approach to personal mitigation. However, past researchers have not dealt with those PMFs in any detail. The present study, in contrast, was a focused exploration of the three character-based PMFs, and was specifically designed to help explain and expand on the quantitative findings from Study 1. It is also the first piece of research to apply a sequential explanatory mixed methods approach to the study of personal mitigation, designing the qualitative research specifically to build on quantitative findings.

The past qualitative research on PMFs was also methodologically limited in various ways. Shapland (1981) used only content analysis, i.e., counting mentions of different mitigating factors across counsels' speeches in mitigation. This method lacks the richness of other forms of qualitative analysis and can risk becoming a proxy for quantitative research but without the benefit of being able to draw conclusions about cause-effect relationships.

The other studies (Gelsthorpe & Loucks, 1997; Hough, Jacobson & Millie, 2003; Jacobson & Hough, 2007; Millie, Tombs & Hough, 2003) used thematic analysis – a well-recognised method for locating patterns within qualitative data (see p. 141 and Appendix 7) – but their analyses had various methodological issues. First, none of the researchers acknowledged their underlying epistemology and its consequences. Instead, researchers

appear to have defaulted to what Guba and Lincoln (1994) call “naïve realism” (see also Braun & Clarke, 2006), i.e., assuming that participants’ talk about PMFs and their connection to sentencing outcomes could be taken as transparent representations of objective ‘truths’ about the sentencing process, rather than reflecting participants’ own subjective perceptions and/or experiences of sentencing. Taking an uncritical realist stance can cause researchers to draw invalid conclusions from their research. Second, there were no descriptions of the analytic process, or even acknowledgment that there is a choice of methods and the choice will influence the kind of questions that can be answered. As a result, readers cannot evaluate the rigour applied to each analysis, e.g., how data were coded and themes developed, or whether the results presented were representative of the whole data set or were focused on responding to particular research questions. Third, some studies made insufficient use of verbatim extracts, which can make it very difficult to evaluate whether the conclusions drawn are adequately supported by the data.

Jacobson and Hough’s (2007) study arguably illustrates several of the methodological limitations found in past qualitative studies of personal mitigation. The authors report qualitative findings from both observations of sentencing hearings and interviews with sentencers. However, the study contains no discussion of epistemology, choice of analytic methods, or description of the analytic process. Consequently, there is no way to evaluate the process used. Further, Jacobson and Hough’s conclusions infer cause-effect relationships between PMFs and sentencing judgments that cannot be justified on the basis of a qualitative study. The authors state, for example, that “it is clear that the severity of a sentence tends to be reduced if an offender has no previous convictions at all” (p. 31); and “from both our observations and our interviews we have concluded that mitigating issues relating to the defendant’s present and future tend to play the greatest part in sentencing decisions” (p. 33). Lastly, Jacobson and Hough (2007) made very limited use of verbatim extracts, preferring to

paraphrase rather than quote (there may have been practical reasons for this, but if so, it would have been helpful to state these explicitly). If participants' responses are paraphrased, there is a far greater risk that results will be shaped to fit the researchers' assumptions, perspectives, etc. The researchers should have acknowledged that they were not mere recorders of fact but were actively involved in generating the study's conclusions, and should have taken proper account of this when preparing their analysis.

Psychology has a rich tradition of detailed, rigorous qualitative research within the criminal justice domain (for recent examples, see Ben-David, 2016; Livingston, Crocker, Nicholls, & Seto, 2016; Naughton, O'Donnell, Greenwood, & Muldoon, 2015; Marzano, Ciclitira, & Adler, 2016), as well as helpful guidance regarding steps that can be taken to ensure qualitative research is as rigorous as possible (e.g., Braun & Clarke, 2006; Fereday & Muir-Cochrane, 2006; Silverman, 2011; Trahan & Stewart, 2013; Yardley & Bishop, 2008; Willig, 2013). Some criminologists have also embraced a more rigorous approach to qualitative research, such as Jeffries and Bond (2010) and Stewart and Trahan (2012). The present study aimed to approach the exploration of character-based PMFs with the level of rigour shown in qualitative psychological research.

3.2. Aims and Objectives of the Present Study

The study's overall aim was to use appropriately rigorous qualitative methods to explore how judges perceive character-based PMFs, in order to provide possible explanations for the unanswered questions raised by Study. The objectives were:

1. To examine how judges define, identify the presence of, and interpret character-based PMFs (remorse, addressing drug/alcohol addiction, and good character).
2. To investigate judges' perceptions of:

- a. How character-based PMFs influence each other, when they appear together in cases.
- b. The relationship between character-based PMFs and choice of sentence type (custody, community sentence, or fine).
- c. Whether the presence of character-based PMFs affects sentencing decisions differently across different offence types (especially violent versus property offences).

It is important to note that unlike past qualitative studies of PMFs in sentencing, the present study did *not* aim to draw any conclusions about causal relationships between PMFs and judges' sentencing judgments. This thesis adopts the position set out at pp. 31-32 of Chapter 1 that it is unlikely sentencers can provide veridical accounts of their own sentencing strategies. Study 2's aims relate very specifically to sentencers' *perceptions* of PMFs. Those perceptions were analysed in order to explore possible explanations for the unanswered questions raised by Study 1, to develop a fuller picture of the process of personal mitigation, and to generate ideas for future research.

3.3. Method

3.3.1. Participants

Participants were seven England and Wales Crown Court judges, recruited through the researcher's existing contacts in the legal community. Six of the participants were male; one was female. Participants had a mean of 21.43 years' sentencing experience ($SD = 4.59$).

3.3.2. Design

Data were collected using semi-structured interviews. This made it possible to ask each participant a specific set of questions to each participant, but also provided the

flexibility to probe interesting areas as they arose, and follow the participants' interests or concerns (Smith & Osborn, 2008).

The semi-structured interviews were based on the question script at Appendix 6, which was developed based on the study's research aims and the quantitative findings from Study 1. The first group of questions, "General questions about the PMFs", were intended to explore sentencers' understanding of the PMFs – what they mean, and how the judges determine whether a given PMF is present in a case or not. The second group of questions, "Questions about my empirical findings", were designed to explore issues arising from Study 1's quantitative findings. Lastly, "Questions about guidance" were intended to explore sentencers' responses to the possibility of guidance on PMFs, as well as the relevance of public opinion to sentencing guidance.

3.3.3. Procedure

Participants were interviewed one-to-one either in their chambers at court (five judges) or at home (two judges). Each judge was asked the questions on the script at Appendix 6, along with various other relevant questions that emerged organically during the interview process. The interviews lasted between 20 minutes and 1 ½ hours. Interviews were audio recorded with the prior verbal consent of the interviewees. One interviewee did not give consent and so detailed notes were taken instead, verbatim wherever possible. Each interview recording was anonymised and transcribed verbatim.

3.3.4. Ethical Considerations

Before commencing data collection, ethical approval for the study was obtained from the Middlesex University Psychology Research Ethics Committee (REF: PG069-2016). Participants were interviewed in their place of work, i.e. in chambers, with the exception of

two judges who were previously known to the researcher, who were interviewed in their homes. The ethics application therefore included an Independent Field/Location Work Risk Assessment. Participants were given an information sheet and provided informed consent prior to each interview, then received a full debrief afterwards. Other potential ethical/analytical implications of the procedure used are discussed further in the reflective statement included in Section 3.6.5, at pp. 174-175.

3.4. Analysis

This section summarises the analysis that was carried out on the data collected. Further details of the analysis process are included at Appendix 7. The transcripts were analysed using thematic analysis. The present author carried out the coding and analysis alone as it was not practicable to enlist the help of a second coder. It is acknowledged that the analysis process and findings will therefore have been more influenced by the author's individual perspective than would otherwise have been the case.

Thematic analysis made it possible to search for, recognise and organise patterns in the data, in order to identify themes that are important to the understanding of the phenomenon studied (Braun & Clarke, 2006; Fereday & Muir-Cochrane, 2006; Willig, 2013). Thematic analysis is an extremely flexible method that is not attached to any particular theoretical perspective. However, every qualitative analysis carries with it many assumptions about the nature of the data analysed and how they relate to the 'the world' and 'reality'. All too often, underlying assumptions can be left unspoken, which typically results in a naïve realist account of the data (Braun & Clarke, 2006). A realist perspective may often be appropriate, but this should be properly justified by reference to the research question(s) and the nature of the data analysed. It is therefore crucial that qualitative researchers make their epistemological and other assumptions explicit and describe how they carried out their

analysis in detail (Attride-Stirling, 2001; Braun & Clarke, 2006; Holloway & Todres, 2003). Otherwise, it is very hard to evaluate the quality of research and to compare or synthesise it effectively with other studies (Attride-Stirling, 2001).

The epistemology behind the present study is closest to what Willig (2013) calls “critical realism”. The study’s perspective is influenced by the phenomenological emphasis on subjective individual perceptions and experiences, rather than objective external “truths”. It also acknowledges that the data gathered will have limitations, as they will reflect not only judges’ subjective, flexible, interpretations of the phenomenon of sentencing and their strategic goals, but also the interviewer’s own world view, knowledge, and assumptions. To that extent, the research acknowledges the “double hermeneutic” that is central to interpretative phenomenological analysis (Smith & Osborn, 2008): participants try to make sense of the world, while the researcher tries to make sense of the participants trying to make sense of the world. Nevertheless, the goal of the study is to use the exploration of judges’ perceptions and experience of PMFs to support conclusions about what those PMFs mean in practice and how they are used in the sentencing process. Consequently, the study adopts the realist position that qualitative data can be used to provide information about the world, “about how things really are” (Willig, 2013, p. 11); there is a single concrete reality and we can learn about it, to a degree, using appropriate methods (Samsi, 2012).

The process of thematic analysis followed Braun and Clarke’s (2006) six major steps and was very much recursive and iterative rather than purely linear. First, transcripts were read and re-read carefully. Second, the data were coded using preliminary codes based on the study’s research questions, plus some inductively generated codes, and extracts for each code collated into separate documents. Third, themes were identified from the preliminary codes. Fourth, those themes were reviewed to ensure that they were adequately supported by the extracts relating to that theme. Fifth, each theme was given a name designed to give an

immediate sense of its meaning. Lastly, extracts were selected to best illustrate each theme and the final report was written.

3.5. Findings

The following section presents the findings of the thematic analysis. These are presented by topic and theme and structured by reference to the study's research objectives. Appendix 8 contains a table summarising the final topics and themes identified in the data. Selected verbatim extracts from judges' interview transcripts are included to illustrate each theme. In each case (unless otherwise specified), the selected extracts are representative of a larger pool of extracts that supported the theme in question.

3.5.1. Judges' Interpretations of Character-based PMFs

3.5.1.1. Topic 1: Remorse

Is it genuine or not? Sentencers' perceptions of remorse as a PMF turned on the question of whether any remorse expressed was genuine or not: "once you're satisfied that it's genuine, then it does have a big impact" (Judge 1). Concerning the meaning of remorse, judges highlighted the difficulty of distinguishing between an offender who is genuinely remorseful, i.e., feels guilt and regret at having harmed the victim, and one who is sorry he or she was caught, in which case "they're crocodile tears, really":

You don't get people coming into the police station saying, "you've never caught me, but actually I've brought 100 kilograms of cocaine into the country, and I'd like to have a clear slate". So when they claim remorse, it's not so. It's that someone's told them, you get 20 years for this. And they now, if they've got young children and all the rest of it, are deeply upset about it. But they wanted to make their million pounds (Judge 3).

An apology is not enough. Most of the judges stated that they did not find a simple apology to be convincing evidence of remorse. Just saying “oh I’m terribly sorry” is “not very impressive”, because “that doesn’t prove anything”.

I think letters in writing to the judge from the defendant are viewed with a certain degree of scepticism. If they’ve been in custody, you see the same hackneyed phrases appear and the suspicion is that it’s been written for them by the prison scribe. And I find letters, again, I’m generalising, but I find a lot of letters written by defendants to the judge are exculpatory as well as expressing deep remorse, and they set out a catalogue of rather flimsy excuses for their offending. (Judge 2).

Objective evidence is best. Rather than just an apology, judges spoke of looking for objective evidence of remorse in the form of the offender’s actions: “remorse is far more likely to be effective in the judge’s mind if someone has demonstrated – namely by recovery of the goods, or naming of others who were involved – something which shows that they are [remorseful]”. Almost all the judges described a (preferably early) guilty plea as important – “the best evidence of remorse, really” – because “if somebody does feel guilty about what they’ve done, more likely than not they’re going to plead guilty”.

For it to be of any real weight, it needs to be the sort of case in which having done whatever it is they have done, they regret it pretty well immediately – although there’s no direct temporal test – so it may be the following morning or whatever, I’m not suggesting it can’t be, and I’m not suggesting you can’t be genuinely remorseful if there’s more delay than that (Judge 3).

Conversely, pleading not guilty and/or changing your plea late on in the case was perceived by some judges as disingenuous and indicative of a lack of remorse:

I think the timing of the expression of remorse is important. I think that’s very important... I mean often you get these expressions of remorse and regret, and sackcloth and ashes from a defendant who’s pleaded guilty at trial when he’s, not until he’s certain that the prosecution witnesses are going to turn up, and I say to these... I mean counsel do say, “Well he’s very remorseful” and I say, “Well, he’s not, I don’t accept that because if he’d been remorseful he’d have admitted it to the police or at the very least pleaded guilty at an early stage” (Judge 2).

The fact he pleaded not guilty and changed his defence when the DNA evidence came up, that was another major factor, really. Right, well you'd have thought now they've got the DNA evidence, the game is up, he's going to plead guilty. Not a bit of it. And then fabricated his defence and put all the blame onto the girl for egging him on, which was patently not true (Judge 4).

Other actions taken to be evidence of remorse included offenders' response to their arrest or conviction, such as an addict signing up for a drug rehabilitation course and reparation, e.g., repayment of money stolen from the victim:

Inevitably you've got a gap between the commission of the offence and the sentencing, so you can actually see what somebody's done. So that if, for example, somebody's remanded in custody, and they committed the offence because of a drug or alcohol problem, and if they've gone on intensive programmes to try and address that, you'll quite often get input from the prison itself. And that, you know, so there you've got very clear evidence of remorse and determination to reform (Judge 1).

You would have to demonstrate, for me to give you credit for remorse, something that goes beyond simply stating [that you are sorry] such as returning the goods, taking the police to where you'd hidden the goods or the fence to whom you'd supplied the goods, and a positive effort to get them back because you realise that it was an elderly person and the sentimental value would be considerable (Judge 6).

However, the relationship between remorse and reparation can be complicated, as "it's incredibly difficult to judge whether that is simply being done for mitigation purposes, or whether there is genuine contrition".

Behaviour in court can matter, too. Despite the dominant focus on evidence that can be determined objectively as a matter of fact, there was also evidence that judges may assess the validity of remorse subjectively, based on a face-to-face evaluation of the offender's behaviour in court:

Where someone has been on trial and has been found guilty, you have seen how they've behaved in the dock, you have seen how they've behaved when they gave evidence, if they gave evidence – which quite often people do, if they're pleading not guilty – and you can form your own judgment about it. Because that's what it boils down to. In the case of that... rapist, he sat in the dock

absolutely blank faced. He didn't say anything, he didn't do anything, he simply sat there, and he watched this girl... give evidence, and relive her ordeal... He didn't bat an eyelid... And so when I had his barrister saying how much he was covered in shame, and how full of contrition and remorse he was, I didn't believe a word of it (Judge 4).

3.5.1.2. Topic 2: Good character

Positive good character vs. no previous convictions. The interviews revealed widespread inconsistency regarding the definition of good character. Strictly speaking in terms of the language used in the current sentencing guidelines, it is incorrect to refer to a lack of previous convictions as good character. This is because “no previous convictions” is listed as a separate PMF in the guidelines, and so ought to be dealt with separately. However, all but one of the judges interviewed used the term “good character” to refer to both positive good character and no previous convictions.

So good character: one, no previous convictions, but two you've got the much more positive part of good character, where somebody is really a very good, kind person (Judge 1).

I mean it's very important, particularly if it's positive good character, rather than just an absence of convictions (Judge 2).

It can be no previous. It can also be he's been running the local... youth football team for ten years, and he's a fine upstanding member of the community. Or he is aged 18, he is very keen on football, he's very good at it, he's been playing in the local first team for years, it would be a terrible shame to take him away from that. Good works (Judge 5).

Only one judge was clear that the PMF good character refers only to positive good character:

Most guidelines are structured on the basis that the recommendation is for someone of good character, so that means that good character mitigation means positive good character. Which means making a significant contribution to society, that type of thing. Not just the norm (Judge 3).

Several judges expressed the (incorrect) view that good character could consist of no previous convictions alone:

Good character means that this is the first time that someone has been convicted of or pleaded guilty to an offence (Judge 6).

Good character is influential because it is a fact: it means that someone has never been in trouble before (Judge 7).

Lastly, one judge suggested that an offender could not get credit for positive good character unless (s)he also had no previous convictions:

I think really good character comes in two stages, one are you dealing with someone with no previous convictions? If so, that can be built on so you can develop a positive case that this is a very, very good person who's had for whatever reason a lapse in an otherwise very good life... Of course you've only got it once, you often say to someone, "I take into account your good character but you'll realise of course you've lost that now. That's a point that'll never be available to you again" (Judge 1).

The importance of character references. It was generally agreed that positive good character was typically established through character references, e.g., "there may be character references from a range of people, some of whom may be very impressive"; "you occasionally get letters from the local scout leader or the local church or whatever... it makes a difference". As regards the weight that should be given to character references, opinion was divided. Most sentencers' comments suggested that a good set of references could change their impression of the case entirely, although it ultimately "depends what it is and the context of the case":

Half a dozen good character references, and then all of a sudden you're just... you're dealing with not just with somebody of good character in the sense of no previous convictions, but a really good person... So that's hugely important, and I always find things like that letter from somebody who's employed somebody for a decade in a position of trust and responsibility, a letter from even a mother or a father or other close family member, somebody perhaps who's the secretary of a club that knows them – people that know them well – it can often carry more weight than a pre-sentence report prepared by a professional who's met them once or twice (Judge 1).

One judge, on the other hand, was more sceptical:

The impression I get and my experience at the bar is that you, five minutes before you're due to go into court you get handed this sheaf of letters, which you rather apologetically hand up firstly because you know they're not going to make much difference and secondly you think it's going to irritate the judge that's got a busy list, that he's got piles of letters from mothers, sisters, aunts and uncles saying what a really nice guy this fellow with ten previous convictions for violence or burglary, so but I mean, as I say, these are generalisations. There are cases where a letter can be moving and sometimes you know, often you get a defendant who actually does, there's a very contrasting side to his nature, or his or her nature, and they do good works in the community and they look after disabled relatives, and there's that side to it. And that does have an impact (Judge 2).

A stable employment record was also frequently cited as a basis for inferring positive good character:

Normally somebody like that would be in good employment, or... and you know the best thing you can have is... that they've got a good job and they're highly regarded by their employers and by family members (Judge 1).

Good character is not exemplary conduct. Only one judge mentioned anything about the one-off “exemplary conduct” sense of good character, rather than the more common, everyday sense of good works/reputation in the community.

It is jumping into the Thames and saving a child. Sometimes you do get them, rather surprisingly, but you do. You do get them, I've had them... Not actually jumping into the Thames but I've had life-saving. Yeah. Burning building is one I remember... you know you can get away with knocking six months off by saying, “you are not really entitled to this but you are someone of positive good character, there is a clearly demonstrated other side to your personality. You are capable of altruistic bravery and I'll recognise that and I'll reduce the sentence... But that's obviously an exceptional case, and quite rare (Judge 3).

The lack of mentions of exemplary conduct is perhaps surprising, since it is the only sense of good character that is typically mentioned in sentencing textbooks and discussed by academics (e.g., Ashworth, 2015; Banks & Harris, 2012; Roberts, Padfield, & Harris, 2017).

Good character and “one-off” offences. The interviews provided some insight into why sentencers may see good character as a PMF; it seemed to be linked to their perceptions about whether the offender’s behaviour was a one-off ‘lapse’ or was indicative of their having an overall criminal character: “is this a blemish in an otherwise law-abiding life, or is he a ne’er-do-well?”

An offence often is committed on the spur of the moment. For example, stabbing someone only takes a second. Maybe there’s a build-up or a plan to it but the whole incident may be over within the day – the planning of the offence and putting it into execution. Good character is something that can be built up over many years, and therefore that may demonstrate better the nature of the person with whom you’re dealing, far better than the one-off incident which may truly be an aberration. (Judge 6).

Four of the judges repeated a similar narrative of a typical case where positive good character is particularly relevant: a young man getting into a drunken bar fight.

I was dealing with a group of young men who were scaffolders, and they were working away from home, and after work they had a few drinks, they go into the local town, they have a fight with some of the local boys, they were big tough lads these scaffolders, so they won the fight and won it handsomely. So they end up in the dock, the other guys end up as prosecution witnesses. And they all had good jobs, in fact they were all of clean character, and that was a case really where good character and good references saying, you know, “this young man can earn 500 quid a week or something as a scaffolder. If he loses his liberty, he loses his job, he goes into prison, there’s a risk then of him mixing with people who will damage his character”. So you look, you look to give people like that a chance (Judge 1).

The presence of this kind of a typical narrative (which echoes the “typical” one-off case type reported by Jacobson & Hough, 2007) raises a potential issue. Positive good character is clearly a subjective factor. If judges are particularly inclined to think of a drunken assault as being a one-off lapse, then they may be more influenced by positive good character in this kind of case than in one that is less stereotypical in nature. In some of the accounts there was almost a sense of legitimisation of the criminal behaviour: “good youngsters go out, drink, I mean I think typical is group violence, because whoever wins the fight ends up in the dock

and the losers end up as the prosecution witnesses. It could so easily be the other way around”; “it’s just one of those things”. One judge even observed that “certainly in my younger days as a barrister, there was an element of “well, what do you expect in the pubs the steelworkers go to?” Further research would be required to explore this question in more detail. The judges did not cite any typical case of remorse or addressing addiction in an equivalent way.

3.5.1.3. Topic 3: Addressing addiction

It deals with the cause of offending. Some judges perceived addressing addiction as important because it deals with the cause of the offending, i.e., many offenders commit crimes because they are under the influence of drugs or alcohol, or in order to fund their addiction. Comments included “it’s the addiction that causes the offending”; “if you can break the drug offending, then that person may no longer offend”; and “it’s cheaper in the long run if you can break this habit”.

If you know what the cause of offending is, which is pretty obvious if you’ve got a drug addict who needs more drugs, and so you can identify what the problem is... If there is a plan put forward, a realistic plan, to address the problem, any judge is going to be easily persuaded to go down it (Judge 4).

A cusp PMF – treatment requires a community sentence. Judges also appeared to view addressing addiction as very much a ‘cusp’ PMF, i.e., a factor that “tends to kick in in relation to offences where you might have a real choice about whether to send someone to prison or not”.

I mean you may be looking at somebody in their thirties with a history of petty crime and more serious crime like burglary over many years, or because they’ve been a heroin addict for the last twelve years and suddenly they’re on a programme, and somebody who’s running the programme says they’re making a real effort, they’re on methadone, they’re gradually reducing the methadone, there’s a real chance of success, and then you think if you send somebody like that to prison, you

may be knocking them right back if they're doing it on the outside... I mean, if it's three strikes and you're out with a burglary... then that's different, but if it's not then you would look for a way... (Judge 1).

The natural consequence of a judge determining that an offender is addressing his or her addiction is that (s)he should be given the chance to continue that process. Participation in some kind of drug or alcohol treatment programme typically takes place in the community, and the majority of judges shared the perception that such programmes are rarely available in prison (which may make them less likely to consider it as an option):

There are obviously programmes in prison as well... And part of the problem as well, is that it's often very difficult to get on these programmes, I'm told (Judge 1).

The probation report is likely to be going on about courses that are available in the community. And you know that if you pass a custodial sentence, the probability is that these things aren't going to be available (Judge 3).

However, one judge did express the opposite opinion, stating that "offenders can get treatment in prison as well, and so dealing with addiction can still be a relevant mitigating factor where a prison sentence is necessarily involved".

Therapeutic jurisprudence. One other pattern identified in the data was that some of the judges seemed to get a real sense of satisfaction from giving an addict a chance to recover from their addiction, and this encouraged them to take account of an addict's attempts to address their addiction if at all possible. This approach echoes the perspective of researchers who have highlighted the therapeutic potential of the legal system, especially in the context of drug rehabilitation (e.g., Kaiser & Holtfreter, 2015; Nolan, 2001; Wexler, 2000; Wexler & Winick, 1996; Winick & Wexler, 2015).

There's a... Drug Rehabilitation Requirement, which I used to, well I think all of us used to use quite a bit, at least, it involved... them coming back every month, hopefully in front of the judge who passed the sentence, and you review their progress. You know, and when you do get, you get

to know them really, and on the odd occasion that you get one that succeeds with it, it's really quite a joy, because you don't much, you don't get much joy in the job (Judge 2).

I had one chap who was the most amazing young man... And he had a drug problem, and when you give people a community sentence or send them to a drug rehabilitation unit residential, you can have reviews and ask to see them every day or every week or every month. Which is something I like to do because I think it helps that they know that they've got to come back and face the judge and tell him what they've been up to... And certainly in this man's case, I saw him for, I don't know nine months or something like that, and by the time I'd got to the end of this process – it might've been longer – he'd found himself a job, he'd got himself on a number of courses, and I really felt that, you know, he'd done everything he possibly could to stop the whole... and he's never been back (Judge 4).

No second, third, fourth, etc. chances. Judges' comments on addressing addiction highlighted that the PMF is not available indefinitely to repeat offenders. If an addict pleads "the same mitigation that was last year, then it's not going to work", and any rehabilitation plan is subject to "how many times has this been tried in the past".

The time comes when everything thing's been tried two or three times and every time it's failed, and sometimes you hold up your hands as it were in despair, and say, "you know, there just is no point". You can't set somebody up to fail, that's cruel, you know and really, really unfair. So if you think there really is no chance, look I'm going to... my temptation in those cases is to pass as long a sentence as I feel like I properly can, in the sense, that, you know, "I've just given you nine years in prison, you're going to be four-and-a-half years in prison. That gives you ample time to sit back and think about your addiction, and use whatever facilities are available in the prison to do something about it when you come out (Judge 4).

3.5.2. Judges' Perceptions of Interactions Between Character-based PMFs

Study 1 found that PMFs in general, and character-based PMFs in particular, frequently occur together (see Chapter 2, pp. 80-83 and 101-104). Study 1 also found that the effects of PMFs on sentencing outcomes were not purely additive. Specifically, remorse and addressing addiction were each underweighted when they occurred together in both assault and burglary cases, and good character and addressing addiction were each underweighted

when they occurred together in burglary cases. The present study generated various possible explanations for this apparent underweighting of multiple PMFs.

3.5.2.1. Topic 4: Underweighting of multiple PMFs

PMFs seen as two sides of the same coin. Judges' comments often suggested a conceptual link between remorse and addressing addiction. In particular, addressing addiction was seen as evidence of remorse:

If, for example, somebody's remanded in custody, and they committed the offence because of a drug or alcohol problem, and if they've gone on intensive programmes to try and address that, you'll quite often get input from the prison itself. And that, you know, so there you've got very clear evidence of remorse and determination to reform, so it's all part of addressing a problem and trying to reform, so remorse again is part of the story there (Judge 1).

They're two sides of the same coin, in a way... because they might say "well, I've realised now that I've committed this offence and I realise that I wouldn't have done it if it hadn't been for the addiction and I'm going to do something about it" (Judge 2).

No judges described any inter-relationship between good character and addressing addiction.

Personal mitigation is assessed holistically. As well as perceiving a particular inter-relationship between remorse and addressing addiction, several judges' comments suggested that they viewed personal mitigation more generally as a holistic process – intuitively assessing all of an offender's circumstances – their personal narrative – in the round rather than totting up individual factors: "it's a combination of all the mitigating factors", based on "a package of good mitigation", or "the total picture of the background". Rather than adding individual factors, "you're looking at the whole offender"; "you have to sort of lump them together".

Something which is very difficult to rationalise is the sort of circumstances and background of the offender. So if you take it to one extreme you've got girl who's been away to university, dropped out of the course because of being introduced to drugs, gone off the rails completely, now commits

burglary. Familial support, offers of courses etc. I would think 19 out of 20 of us are not going to send that person to prison. If at the other end of the scale you've got a chap who's been off the rails for years, he's committed burglaries in the past, it is said he is going to address it but you're a bit sceptical, you will investigate and consider it because it's cheaper in the long run if you can break this habit. But of course, if it's the same mitigation that was last year, then it's not going to work (Judge 3).

Judge 5 was an interesting case, because on the one hand they expressed a belief in experience-based, holistic sentencing:

You can't just go on adding five percent here and there... It's not, it's an art and not a science. It's not mechanistic... I think if you've been doing crime as long as we have... you get a feel... I can look at a case, if a sentence comes in front of me I can get – you can tweak it and tinker with it, but the moment you've looked at it you think this is within a range (Judge 5).

On the other hand, however, Judge 5 repeatedly spoke about mitigation in a way that suggested their approach was actually highly numerical in character. For example:

Alright then, you're one of a gang of four armed robbers robbing a bank with guns, and they've all done it before... And you haven't, of course they've done it before, and that is the aggravating feature, so they're going to get sixteen years, and you're going to get ten to twelve... If you take a starting point of twelve, mine comes down to ten, because I'm of good character; theirs goes up to sixteen because they've done it before (Judge 5).

Judge 1 also made one comment that suggested they thought about mitigation as a numerical or additive process:

You'd say here are the aggravating features, the starting point would be say 18 years, you've got the fact that you were in a group of four, the fact that it was unnecessarily prolonged violence, something like that, that takes it up a scale, and then your good character will bring it down, so I will remain at 18 years, for example (Judge 1).

Judges' justifications for underweighting. Several judges argued that PMFs could not simply be additive because the total mitigation available in any case was limited by the need for the final sentence to reflect the overall seriousness of the offence; “the combined effect of all the mitigation is unlikely to drive it down below the sort of irreducible seriousness thing”.

From this perspective, an element of underweighting when multiple PMFs were present in a case was viewed as inevitable.

I don't think you weight to a nicety. The weight you give to each of them is the combined weight of all the mitigation... Because otherwise, if you were to give X percentage reduction for each mitigating factor, you'd end up by saying "well, you've now got six months in credit to the next offence..." (Judge 4).

Well, there's a limit. You can't add 10% for each of ten mitigating factors, or you'd end up with no sentence at all... You've got to end up with a sentence that reflects, that does justice to both sides – does justice to the defendant for all the good things about his mitigation, but also does justice to the public and the victim. So, it's quite difficult to get mitigation to affect the sentence by more than, say, 40%... Once you've given him 40% off for his going to the police station the next day and admitting it, and any other bits and pieces, to get it beyond 40% is pushing it... (Judge 5).

Judge 3 made two additional points that suggest other possible explanations for the underweighting of multiple PMFs. First, they noted that reduction of a sentence for PMFs was limited by the relatively narrow sentencing ranges specified by the current guidelines:

Well, there's a law of diminishing returns because of the effect of the guidelines. It's a brave sentencer who steps outside of the guidelines because of the combination of mitigating factors that you've got... before the guidelines, if you had a full hand of mitigating factors, you could get an exceptional result. In theory, you should still be able to do so, but in practice the effect of the guidelines has been to harden it up... What I have a problem with is the salami slicing of little bands of sentencing, which are the enemy of personal mitigation (Judge 3).

Second, they perceived that there was pressure put on judges to avoid sentences that could be viewed as overly lenient:

There are a lot of factors at work here. You have the introduction and then expansion of the prosecution's right of appeal. That has had an un-looked for consequence in meaning that judges who were inclined to be merciful are cautious... they used to publish a sort of hall of shame from the point of view of the Daily Mail readers of the judges who'd had their sentences increased more than anybody else...this has a pernicious effect because people don't like being pilloried as being woolly liberals (Judge 3).

3.5.3. Relationship Between Character-based PMFs and Choice of Sentence Type

3.5.3.1. Topic 5: PMFs and borderline cases

PMFs matter most in borderline cases. There were no particular patterns found in the data to suggest that judges viewed PMFs differently in a case that necessarily involved a community sentence from one that required immediate custody. Judges' comments focused instead on the relationship between PMFs and cases lying on the borderline between immediate custody and a community or suspended sentence. Past research has identified a perception amongst sentencers that personal mitigation is particularly important for pulling borderline cases back from immediate custody (Hough, Jacobson, & Millie, 2003; Millie, Tombs, & Hough, 2007). This perception was supported by the findings of Study 1 that almost all PMFs listed in the guidelines are associated with a reduced likelihood of immediate custody (see Chapter 2). The judges in the present study also perceived a link between the PMFs studied and the choice between custody and not for borderline cases. Some comments related to personal mitigation in general:

A suspended sentence is up to a maximum of two years, and so again it's a huge point where remorse, good character, addressing an addiction, can pull something back beyond the two years. I mean quite often a lot of speeches in mitigation are aimed at trying to persuade the judge that it's less than two years so you have the option of suspending (Judge 1).

Other comments dealt specifically with remorse...

If defence counsel can demonstrate genuine remorse, however, by whatever means, then I, it can make the judge's job very difficult, because it can turn a case from being three years imprisonment, to "oh dear, do I have to send him inside?" (Judge 5).

...good character...

You do get references that they work for saying he's a good lad, and you know is a staunch member of the football team, and he trains the mini, you know the mini footballs and things like that, you know somebody like that, you're very hesitant, you don't want to send to prison if you can find a way, and so that's the beauty of the suspended sentence, really (Judge 2).

...and addressing addiction...

If we have, for example, someone who's committed a relatively minor, by which I mean up to and including subsection 20 wounding, offence of violence, and there is good quality material from the probation service that is linked to addiction which he is a good subject for such schemes as are available to deal with it... And if it's good stuff, that may well make the difference between immediate custody and not (Judge 3).

If there is a chance, take it. The concept of personal mitigation as giving an offender a chance, or taking a chance with him or her, recurred frequently throughout the data set, in phrases such as "you look to give people like that a chance", "if there is a chance, take it", and "you want to try and give someone a chance".

And the number of times you say, "I'm going to take a risk with you. Don't let me down, I'm going to give you a suspended sentence" (Judge 5).

It may be that when judges have to deal with borderline cases, PMFs such as remorse or good character influence their perception of the offender, creating the impression that he or she is the kind of person who should not or need not be sent to prison. In other words, PMFs may cause judges to focus on rehabilitative aspects of sentencing, as opposed to e.g., deterrence or public protection. It is notable that one of the offence types where the judges agreed personal mitigation was not persuasive (see Theme 6 below) was drug offences, the current sentencing of which emphasises deterrence over the other purposes of sentencing.

3.5.4. Does Offence Type Moderate the Effect of Character-based PMFs on Sentencing?

3.5.4.1. Topic 6: PMFs and offence type/seriousness

Addiction linked to burglary. Study 1 found that the effects of remorse and good character varied little between assault and burglary. The qualitative data supported this finding to the extent that judges did not identify any differences in their perception of PMFs between those two offence types. However, Study 1 also found that addressing addiction had

a larger mitigating effect on burglary cases than assault cases. None of the judges were able to offer any direct insight into this finding.

However, some respondents did refer to a perceived endemic link between addiction and burglary:

I mean, huge numbers of burglaries and thefts occur because somebody's got a drug habit...they've got to find £100 a day, and the only way they can do that unless they've got a bloody good job is to go out and commit burglaries and things and frauds and things like that (Judge 1).

The majority of burglary offences are domestic burglaries, seem to be people who are drug addicts, acquisitive criminals or drunks who sort of... you know somebody looking for quick money (Judge 2).

The presence of this perception suggests one reason why addressing addiction may have more impact on sentencing for burglary than for assault. If addiction and burglary are strongly linked in judges' minds, they may see a stronger possibility that addressing an offender's addiction will reduce the chance of future offending in burglary cases than in cases of assault.

When asked whether their use of PMFs depends on offence type, judges tended to identify exceptions, certain specific offence types where they believed personal mitigation was less relevant than in other cases. Three distinct themes emerged in relation to those exceptions.

PMFs matter less for long-term offences. First, judges perceived PMFs as unimportant in cases involving a pattern of behaviour over an extended period, such as historic sex abuse or long-term fraud.

Obviously historic sex abuse cases, where they've abused people over a long period of time, it's an artificial idea that they're of good character, because they were committing offences all the time it just hasn't been discovered (Judge 3).

If you've committed a Ponzi fraud... And you've done it over several years, and you've taken millions of pounds off victims who've been left either having lost huge amounts of money or

penniless, and all the consequences of that, then however much remorse you've shown, and however good your good character is, in my book would make no difference at all (Judge 4).

PMFs matter less in offences that are not about rehabilitation. Second, PMFs may be irrelevant because of the purposes of sentencing that are paramount for a particular offence. For example, sentencing for drug trafficking is about deterrence, punishment and protection of the public, rather than rehabilitation.

A vast number of people deal in drugs in order to fund their own habit, and depending on their role and depending on the type of drugs, certainly if it's class A, you're thinking about fairly significant prison terms. Because the perception is you've got to protect the public, you've got to punish them, and that's the dominant feature more than the tragedy of an addiction (Judge 1).

There are one or two offences where [good character] doesn't wash. They include large-scale drug trafficking, where there is authority in the Court of Appeal and on this occasion, with which I agree, that because this is all about deterrence, you simply can't. Because the aim of it is to deter people, and so it doesn't work for that reason (Judge 3).

PMFs matter less in offences where custody is guaranteed. Third, PMFs may have less impact because the offence is so serious that a custodial sentence is almost guaranteed. From the way judges tended to describe such cases, it seems that they primarily viewed PMFs as relevant for pulling offenders back from custody in borderline cases (discussed under Aim 2b above). As a result, where custody is unavoidable, the issue of personal mitigation is perceived to fall away somewhat:

I had to sentence three really decent young blokes... they followed this guy out of the pub, pursued him down the road and beat him up, they knocked him to the ground and they all put the boot in. And... he had a broken jaw and fracture around the eye there, so it was clearly a section 18, they all pleaded to section 18. None of them had ever been in trouble, they all came from good families, there must have been 100 people sitting in the public gallery, all their family and friends and supporters, and you know you could feel this wall of, of willpower trying to persuade me not to send them to prison, but the advocates all accepted as they had to that it was a minimum of three years (Judge 1).

In a really serious case, let's say there's a young lad, 24, never been in trouble before, goes out on a Saturday night, has a skinful of booze, gets into an argument, and then knocks somebody to the floor and kicks them around the head, causing them serious injury. Now, that, a good character doesn't obviously save him from immediate custody because that is a custodial case (Judge 2).

3.5.5. Other Topics Identified in the Data

Two additional topics were identified in the data which, although not directly responsive to the research questions for Study 2, were nevertheless relevant to the wider research programme and so they were included in this analysis.

3.5.5.1. Topic 7 – inconsistency of approach

The qualitative data provided substantial evidence of inconsistencies in judges' approach to personal mitigation. While there were clear patterns in the data, and it is important not to overemphasise the extent of variation between judges, "deviant" views were expressed on most of the themes identified. The presence of a degree of inconsistency is not surprising given the inherent subjectivity of the three character-based PMFs and the breadth of discretion that sentencers are currently given to determine the weight to be given to them.

Remorse. There was general agreement about the importance of actions rather than words: a simple apology is not enough. This is consistent with Rachlinski, Guthrie and Wistrich's (2013) experimental findings for US Federal court judges, but not US State court judges or Canadian judges. The judges were also generally consistent in looking for objective evidence of an offender's remorse, in particular a guilty plea. However, one judge took a more extreme position, stating that the only good evidence of remorse was an almost immediate confession/guilty plea: "it's got to really be something that's not after you're caught for it to count proper remorse weight." This is strikingly different from the judge who argued that if an offender attended a drug rehabilitation programme while remanded in custody that would be "very clear evidence of remorse and determination to reform". In

addition, a few judges did appear to value a face-to-face approach based on an intuitive evaluation of the offender's character. For example, "he didn't say anything, he didn't do anything, he simply sat there... He didn't bat an eyelid... And so when I had his barrister saying how much he was covered in shame and how full of contrition and remorse he was, I didn't believe a word of it".

Good character. Most judges interpreted good character as some combination of no previous convictions and positive good character. However, one judge specified that for the purposes of the guidelines, it was limited to positive good character. There were varied attitudes to the weight that should be given to character references, with one judge in particular expressing scepticism about their value:

"it's going to irritate the judge that's got a busy list, that he's got piles of letters from mothers, sisters, aunts and uncles saying what a really nice guy this fellow with ten previous convictions for violence or burglary" (Judge 2).

Another judge criticised what they perceived as a practice of, in effect, treating "being middle-class" as a mitigating factor:

You have the problem that arises from the fact that someone being from a middle-class background, or professional background, or something like that, seems to be regarded in some situations as being a mitigating factor, when to someone like me who's perhaps not from that background, I don't see the logic of it all... I don't regard it as an aggravating feature but I don't regard it as being anything other than neutral (Judge 3).

One judge even argued that good character could be an aggravating factor in certain circumstances:

What might be a huge mitigating factor for one person, might be almost an aggravating factor to another. For example, you know, the sixty-odd-year-old man who's led a blameless life, who over several months has been burgling people around his home left, right and centre. It makes it worse that he's of good character (Judge 4).

Addressing addiction. While most judges perceived that this PMF was more relevant to the choice between custody and not, since accepting it as a factor generally meant allowing the offender to receive treatment in the community, again there was a dissenting voice:

Offenders can get treatment in prison as well, and so dealing with addiction can still be a relevant mitigating factor where a prison sentence is necessarily involved (Judge 7).

Holistic approach not taken by all. Five judges appeared to have a holistic perception of personal mitigation: “you have to sort of lump them all together”. However, both Judge 5 and Judge 1 made comments that suggested their thought processes in relation to mitigation may be more numerical/additive: “if you take a starting point of twelve, mine comes down to ten, because I’m of good character”; “the starting point would be say 18 years, you’ve got the fact that you were in a group of four, the fact that it was unnecessarily prolonged violence, something like that, that takes it up a scale, and then your good character will bring it down”.

3.5.5.2. Topic 8: Reluctance to accept guidance on personal mitigation

It was decided to investigate the likely challenges that would be faced by any attempt to introduce guidance on the use of personal mitigation in sentencing. Each judge was therefore asked for their response to the possibility of guidance in that area. Their responses were almost exclusively negative, and could be classified into five themes.

It’s too difficult – every case is different. First, some judges argued that guidance would be too difficult to produce (“I think it would be very difficult to devise a system like that”) because every case is different – this is the argument so often cited in defence of the need for judicial discretion in sentencing (see my discussion at pp. 254-255 of Chapter 6):

I don’t think that’s a useful exercise, because again it depends on the facts of the case. Because what might be a huge mitigating factor for one person might be almost an aggravating factor to another (Judge 4).

The trouble with people who commit offences is that the offences they commit are all different, the aggravating and mitigating features are all different, and they're all different. They've all got different families... the circumstances are infinitely variable, and it becomes a matter of feel (Judge 5).

Judge 5 also argued that they had developed a "feel" for sentencing based on their experience – "I can look at a case, if a sentence comes in front of me I can get... you can tweak it and tinker with it, but the moment you've looked at it you think this is within a range" – an argument that is fundamentally inconsistent with the assertion that every case is different.

Guidance is not needed. Second, a few judges thought guidance was simply not needed and/or would "unnecessarily complicate and confuse" the process of personal mitigation:

I'm not keen on that idea. I think you don't want to over-complicate it. You know, you don't want to say that for example location and timing of the offence is worth six months... or anything like that (Judge 1).

I've never felt that the guidelines needed any expanding on what the factors mean, because I think they're self-evident in a particular case, and I think any further assistance from the Sentencing Council will just be a waste of words, really (Judge 4).

It's best dealt with by experience. The third argument was that personal mitigation is best dealt with by the sentencers' judgment and experience:

You've got to leave it to the judge... You've got to trust the judge, his judgment and discretion (Judge 4).

It's a matter of feel... No substitute for doing it... The answer... I'm afraid, is experienced criminal barristers becoming criminal judges (Judge 5).

That's what our training is for. Lastly, it was proposed that the training received by judges and magistrates provided sufficient guidance on dealing with personal mitigation – "that's why we go on courses":

There's the judicial college, and the training provided to judges is superb, really superb. I don't know how good it is for magistrates but I would imagine it's as good as for professional people... I don't know that it's really possible to do much more than has been done (Judge 1).

Support for guidance. Only Judge 3 had any positive suggestions about guidance on the use of PMFs in sentencing:

Well, I think in the modern world, having deprecated them throughout, it's probably going to have a structure somewhat similar to the Sentencing Guidelines, because that's what people are now used to looking at... I think a discursive/philosophical type of thing is not going to work, now... I suppose if I was doing it, you first of all do have to define what the aims of sentencing are. And then why is it that sentencing should be moderated. And you have to do it by logic, rather than gut reaction. So, it's that logically, if your aims are X, Y and Z, then these are mitigating factors. Why is having a disadvantaged background, potentially in some cases a mitigating factor? [I]n its most acute example, if you've got someone who was sexually abused as a child, and you know that, and this is a cycle of abuse case, is that relevant mitigation? Now I would say it is, but what weight can you give it? Well, you move to the next, and so on... I think the only logic would be to do it by reference to aims. I think otherwise, all you're doing is taking a snap-shot in time as to people's collections of preferences and prejudices (Judge 3).

3.6. Discussion

3.6.1. Judges' Perceptions of Character-based PMFs

The qualitative results for the themes of remorse, good character and addressing addiction illustrate two important general points about judges' perceptions of character-based PMFs. First, there is an important prior step in the process of personal mitigation that has never been explored in any detail. The vast majority of past sentencing research has focused on how much weight sentencers give to particular sentencing factors. However, there has been little or no research into the factors that determine how much weight sentencers give to one factor or another. Before sentencers decide what impact mitigation should have on an offender's final sentence, they must first decide whether a given PMF is present or not, and what (if any) weight it should be given (see Figure 3.1 below). Process A is the influence of

various items of evidence on the evaluation of each PMF. Process B is the effect of each PMF on the final sentence outcome). Sentencers may not agree on what each PMF means in practice and may also vary substantially in the types of evidence they look for and rely on when evaluating a PMF. Statistical analyses of sentencing outcomes (such as those summarised at pp. 4-9 of Chapter 1 and Study 1 in this thesis) cannot provide any insight into this important, highly subjective prior step in the sentencing process. Qualitative research can provide assistance by suggesting tentative explanations itself and also by identifying areas where future quantitative research could provide more answers.

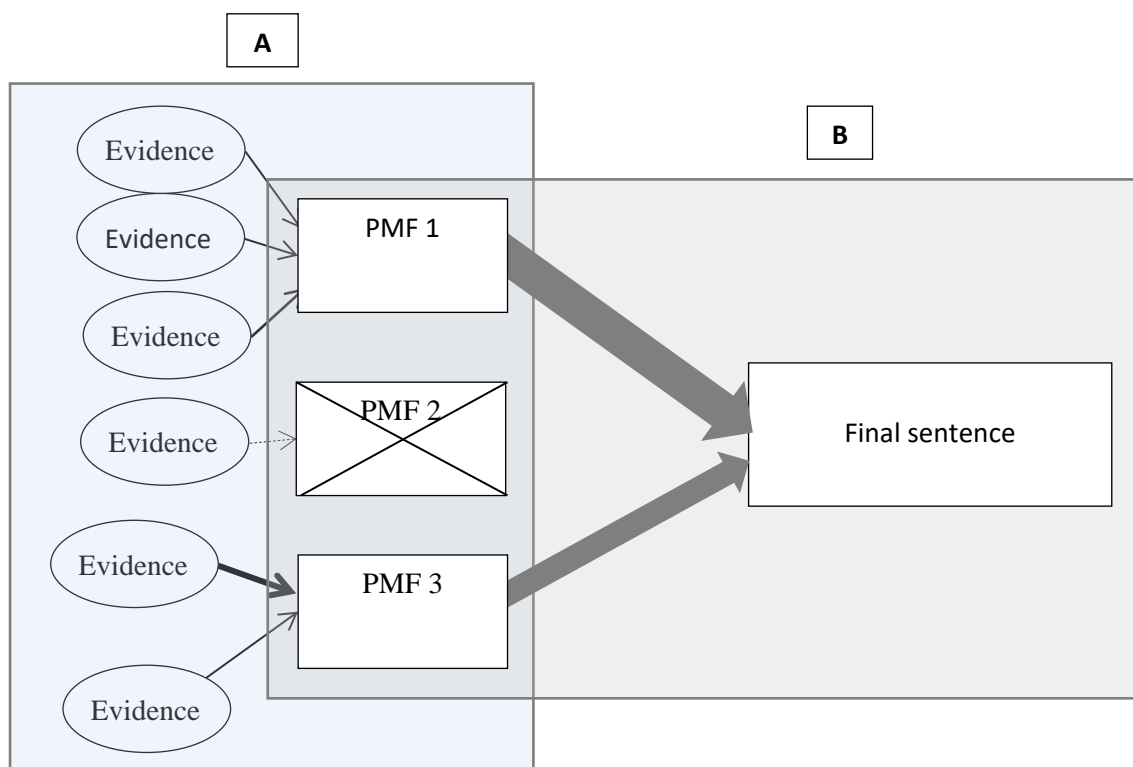


Figure 3.1. Diagram illustrating the two processes involved in PMFs' effect on a final sentence.

Second, there are clear patterns in the data regarding how PMFs are perceived by sentencers (e.g. how they are understood, what evidence is considered relevant), which could realistically be used to assist the development of sentencing guidance. This general finding

challenges the argument made by sentencers in this study and elsewhere that PMFs are so infinitely varied that no generalisation is possible. At the same time, there is also enough inconsistency between the approaches taken by individual judges to suggest that clarification of various elements of the PMFs would be helpful. In other words, the data suggests that guidance could be both feasible and useful.

The analysis also identified various specific patterns in judges' perceptions of the individual PMFs studied. Judges' comments on remorse suggested a large amount of scepticism about the genuineness of apologies, and (partly because of that scepticism) a focus on objective evidence where possible: actions rather than words. An early guilty plea may be of key importance. These findings echo the scepticism reported by Hough, Jacobson and Millie (2003) and Millie, Tombs and Hough (2007); the focus on objective evidence is consistent with the judges interviewed by Jacobson and Hough (2007) but conflicts somewhat with Gelsthorpe and Loucks' (1997) magistrates, who were more concerned with evaluating the offender's demeanour.

Judges' discussion of good character revealed a general unawareness of the distinction made in the sentencing guidelines between no previous convictions and good character/exemplary conduct. The results also provide a sense of how good character may mitigate sentences by encouraging judges to view an offence as a one-off lapse of judgment. Jacobson and Hough (2007) found a comparable connection between good character and assumptions about behaviour being a one-off "blip" rather than the sign of a criminal character. If an offender's criminal behaviour is out of character, rather than indicative of it, then it suggests they are less likely to reoffend. This ties good character as a PMF to several of the purposes of sentencing, including rehabilitation – the offender is more likely to learn the lesson of his/her ways – and both deterrence and protection of the public, neither of which is relevant to a one-off "moment of madness". In addition, this finding supports the argument,

proposed at p. 20 of Chapter 1 based on the theories of perceptual shorthand and focal concerns (Albonetti, 1987; Steffensmeier, Ulmer, & Kramer, 1998), that character-based PMFs may act by altering sentencers' causal attributions regarding offenders' need for punishment and openness to rehabilitation.

The qualitative data on addressing addiction also provides an insight into how and why this PMF may reduce the likelihood of a custodial sentence. The results support Jacobson and Hough's (2007) finding that judges very much associate addressing addiction with the choice between custody and not. However, the present study goes a step further in identifying that one of the reasons why judges may tend to opt for a community sentence is a pragmatic one: they perceive there to be limited availability of drug treatment in prison. Judges also seem to value the opportunity to play a therapeutic role by giving addicts a chance to reform themselves.

3.6.2. Implications for Understanding the CCSS Data

The thematic analysis of the qualitative data helped to explain several of Study 1's specific quantitative findings, and suggest answers to the questions that Study 1 raised or left unanswered. A range of issues were identified that shed further light on the personal mitigation process and could be developed into testable hypotheses for future quantitative research.

First, two findings from the study suggest reasons why Study 1 may have found addressing addiction to be such a strong PMF. Judges perceived addressing addiction as important because, unlike the other two PMFs studied, it deals with the cause of the offending. In addition, addressing addiction almost inevitably raises the possibility of a community sentence rather than immediate custody, and judges like to give addicts a chance to recover where possible. Conversely, scepticism or caution amongst judges about the

genuineness of remorse may partially explain the relatively minor impact that the factor was found to have on the likelihood of imprisonment.

Second, judges' perceptions of personal mitigation suggested two elements that may interact to explain the underweighting of multiple PMFs (remorse and addressing addiction, and good character and addressing addiction) found in Study 1. In the first place, judges appeared to conceptualise personal mitigation as a holistic process. Psychological research suggests that a holistic, intuitive approach to a phenomenon is likely to lead to underweighting of the individual elements involved, a.k.a. "subadditivity" (Tversky and Koehler, 1994 - for a more detailed discussion of this phenomenon, see Chapter 2, pp. 124-125). Additionally, several practical constraints may influence judges' approach to cases involving multiple PMFs. The possible constraints cited were structural (the restrictions generated by sentencing guideline ranges), motivational (the perceived need to reflect the overall seriousness of a case), and socio-political (pressure to avoid appearing lenient).

Third, several of the themes identified in the data suggest that judges conceptualise character-based PMFs in ways that may help to explain the link between PMFs and the choice of a community sentence rather than custody. First, PMFs are seen as particularly relevant to borderline cases and relatively unimportant in cases where custody is unavoidable. Second, PMFs may create the impression amongst sentencers that an offender is someone worth taking a chance on, or giving a chance to. Third, PMFs (particularly good character) may promote the idea of an offence being a one-off lapse in judgment. Lastly, addressing addiction is a special case that judges may perceive requires treatment in the community.

Lastly, the themes identified in relation to Topic 6, PMFs and offence type/seriousness broadly supported Study 1's finding that the effect of remorse and good character did not differ substantially between assault and burglary cases. When talking about

the relationship between PMFs and offence type, sentencers tended to focus on certain categories of offence that were, for one reason or another, perceived as less amenable to personal mitigation, rather than expressing the view that PMFs necessarily varied from one offence to another as a matter of course. The results did suggest a perceived link between addiction and burglary that may be linked to addressing addiction's greater impact on sentencing for burglary than for assault.

3.6.3. Potential Practical and Methodological Implications

The present study has potential practical and methodological implications. From a practical perspective, the current personal mitigation process in England and Wales lacks guidance not only as regards how PMFs should be weighted in different contexts but also which kinds of evidence should be used to evaluate them, and how. The present study showed how complex the evaluation process can be and uncovered a range of relevant topics that could form part of future guidance or assist in the development of a more structured personal mitigation system.

The inconsistency of approach described in Topic 7 is typical of the kind of issues likely to arise from a discretionary approach to personal mitigation (see e.g., Chapter 1, pp. 6-9). All three character-based PMFs are irreducibly subjective and there is currently no guidance on how to interpret them, and so it is hardly surprising that perceptions of the PMFs vary from one sentencer to another. This finding strengthens the argument that guidance is needed on the use of PMFs in sentencing.

For remorse in particular, there was some evidence of inconsistency in judges' approach to determining the genuineness of remorse, between those who claimed to rely purely on objective evidence and those who preferred a face-to-face, intuitive approach. It may, therefore, be necessary to specify in future whether remorse should ever be assessed

subjectively (especially given that the psychological literature suggests most people are relatively poor lie-detectors), or should be inferred only from offenders' behaviour, such as a confession, an early guilty plea, or attempts at reparation.

The confusion between positive good character and no previous convictions found in the data reflects the lack of clarity between these two terms in the literature on good character (see Chapter 1, pp. 48-49). It also suggests a problem for the interpretation of the results for good character from Study 1. Judges marking the box "good character/exemplary conduct" on the Crown Court Sentencing Survey forms may have sometimes had in mind "no previous convictions", or some combination of that and positive good character. Consequently, the findings for good character should be treated with care, as should any conclusions drawn about differences between sentencing practice and public opinion on good character as a PMF as found in Studies 2 and 3 (since both studies operationalised good character as positive good character rather than no previous convictions). The likelihood of inappropriate conflation of positive good character and no previous convictions could be reduced by changing the wording of the PMF listed in Step Two of the current sentencing guidelines from "good character and/or exemplary conduct" to "*positive* good character and/or exemplary conduct". A footnote could be added to clarify that no previous convictions and positive good character should be treated as separate PMFs.

The themes identified under Topic 8 (reluctance to accept guidance on PMFs) show that any attempt to develop guidance on the use of PMFs in sentencing is highly likely to face strong resistance from the judiciary. As a result, it will be particularly important to engage with sentencers from the earliest possible stage and to be prepared for the kind of arguments they are likely to raise, such as those highlighted in the present study.

Methodologically, the present study illustrates the potential benefits of combining quantitative and qualitative research in an appropriately structured and rigorous way: it enables a virtuous circle of complementary research. Quantitative research identifies cause-effect or correlational relationships between variables but cannot always explain them. Qualitative data suggests possible explanations. Additional quantitative research can then explore the qualitative findings further, developing hypotheses and testing to see whether the data support them (or, strictly speaking, whether they can be falsified by the data). This iterative process generates a progressively deeper and richer understanding of the phenomenon of interest.

Quantitative and qualitative research – especially used in tandem – contribute in different ways to the advance of knowledge. While quantitative research is focused on drawing conclusions about causal relationships, qualitative research – particularly within a sequential explanatory approach – is more about generating ideas and possible interpretations. The difference can be likened to the distinction made in creativity research (e.g., Baer, 2014; Guilford, 1967; Lee & Therriault, 2013; Sowden, Pringle, & Gabora, 2015) between convergent thinking – a linear process aimed at generating a single, correct answer (“does X cause Y or not?”), and divergent thinking – which promotes the generation of many new ideas (“what factors are involved in the process that produces Y?”). It is arguable that quantitative research promotes convergent thinking, while qualitative research promotes divergent thinking. Ultimately, both types of thinking are useful for researchers aiming to gain deeper insight into a phenomenon of interest.

3.6.4. Proposals for Future Research

One of the very useful outcomes of the thematic analysis was that it identified a number of interesting issues that would benefit from further research. In each case, variables

suggested by the present study could be developed into hypotheses for testing in future quantitative studies.

1. Sentencing research to date has been focused on the relationship between sentencing factors and sentence outcomes. There needs to be a change of emphasis towards examining sentencers' use of evidence when determining whether a PMF is present in a particular case, and the weight it should be given, (i.e., process A rather than process B in Figure 3.1, p. 164). It is arguably just as important to know how and why sentencers decide to give credit for PMFs as it is to know how that decision affects sentence outcomes. For example, future research could:
 - a. test the impact of different types of evidence (individually or in combination) on the weight given to remorse in sentencing, e.g., a guilty plea, an apology (written or oral) or reparation;
 - b. explore possible interactions between remorse and the earliness of a guilty plea in reducing the likelihood of immediate custody;
 - c. examine the effect of different types of character reference on the impact of good character on sentencing outcomes; and/or
 - d. examine how many failed attempts at addressing addiction are sufficient to negate the mitigating effect of that PMF.
2. Future research should explore whether the relationship between PMFs and sentencing outcomes is different for offences perceived to be less receptive to personal mitigation, such as sex and/or drug offences, compared to assault or burglary.
3. Future studies should test the two possible explanations (psychological and practical) for the underweighting of multiple PMFs found in Study 1.

4. Researchers should examine how the weight sentencers give to good character may be affected by the extent to which a case confirms to certain stereotypical narratives of offending (e.g., a young man getting into a drunken brawl).

3.6.5. Strengths and Limitations

For thematic analysis in particular, Braun and Clarke note that it is vital to go beyond generic, passive statements about themes “emerging” from the data and recognise the active role that the researcher always plays in collecting data and identifying, selecting and interpreting themes (see also Ely, Vinz, Downing & Anzul, 1997; Taylor & Ussher, 2001). The following reflexive statement is intended to acknowledge the researcher’s relationship with the topic and the impact that it will have had on the study’s findings.

I was a solicitor in a large, well-known London law firm for more than six years. Although I was not involved in criminal cases, I was a litigator and had regular exposure to the judiciary. Judges’ perception of me as a fellow lawyer not only helped me gain access to them in situ but also made it relatively easy to establish rapport and some degree of mutual respect with my interviewees. That rapport facilitated full and honest dialogue and greatly reduced the risk of receiving defensive or strategic/diplomatic responses from individuals who may otherwise have been wary of a social scientist investigating their decision-making practices. My knowledge of law and legal procedure was also useful for managing the interviews, in particular interpreting judges’ comments and directing follow-up questions.

My legal experience has no doubt also given me many preconceptions about judges, including huge respect for their intellectual abilities and achievements and for the difficulty of their job. My awareness of judges as authority figures within the legal profession made it harder to probe, ask difficult questions and challenge my interviewees on contentious issues. However, I am also a psychology researcher with an interest in improving sentencing through

potentially increasing structure and limiting discretion, a position that puts me at odds with many of the views about sentencing typically expressed by the judiciary. I believe that my academic perspective on the sentencing process should hopefully have counterbalanced the influence of my legal background to some degree. Overall, my background and my current research will undoubtedly have affected my conduct of the interviews, how the interviewees responded to me, and my interpretation of the interview data.

Using a mixed-methods approach to research creates challenges. For example, it can be difficult to reconcile the very different kind of data that quantitative and qualitative research generates, and the potentially conflicting epistemologies involved. However, mixed quantitative and qualitative research also benefits from the complementary strengths and non-overlapping weaknesses of the two methods, such as the generalisability of quantitative findings and the rich, contextualised nature of qualitative findings (Green & Caracelli, 2003; Johnson & Turner, 2003).

Adding the present qualitative study to the quantitative analysis carried out in Study 1 produced numerous benefits. First, the qualitative data produced several findings that helped to elaborate and/or clarify the quantitative findings. Second, the present study's findings suggested various interesting avenues for future research that may not otherwise have been identified. Third, this study and Study 1 taken together provide a fuller, richer answer to the wider research question at the heart of this PhD, i.e., "what role do PMFs play in criminal sentencing?" than could be obtained from Study 1 alone. Fourth, the present findings also identified several issues that can help to inform possible future guidance on PMFs in sentencing, for example by highlighting where further clarification is needed on the definition of certain PMFs and their evidential requirements.

In common with many other qualitative studies, my sample size was small ($n = 7$). This was, to some extent a necessary result of the challenges involved in gaining access to members of the judiciary. However, the aim of the study was not to collect comprehensively representative data that would be generalizable across the population of sentencers as a whole. Rather, the aim was to obtain an in-depth sense of how a particular group of judges perceive PMFs in practice, as well as an insight into the richness of personal mitigation as a phenomenon within the sentencing process. Individual judges' perceptions may not be representative of the profession as a whole. However, they helped clarify or explain Study 1's quantitative findings, illustrated the complexity of the personal mitigation judgment process, and identified variables for further study that may not have occurred or been apparent to them otherwise, as well as identifying areas for future research.

Lincoln and Guba (1985) note that the aim of qualitative research is not generalisability, it is transferability (Lincoln & Guba, 1985; see also e.g., Anney, 2014; Kuper, Reeves, & Levinson, 2008; Samsi, 2012). It has been argued that focusing on generalizability "strips away the context that imbues a qualitative study with credibility" (Padgett, 2008, p. 182). Transferability involves asking whether the research describes the phenomenon in sufficient detail to allow readers to evaluate the extent to which the conclusions drawn are transferrable to other times, contexts, and people. The process can be viewed as a collaborative exercise between researcher and reader (Polit & Beck, 2010) and for that reason is sometimes referred to as "reader generalizability" (e.g., Misco, 2007).

Researchers can facilitate judgments about transferability through purposive sampling and thick description (Bitsch, 2005; Lincoln & Guba, 1985). Purposive sampling involves focusing on key respondents with particular knowledge of the research topic (Charmaz, 2003; Schutt, 2006) and aims for sample "adequacy" rather than "size", indicated by depth as well as breadth of information (Bowen, 2008). In the present study, the sample was a group of

experienced Crown Court judges from four different circuits across England and Wales.

Another concept relevant to the sampling process is theoretical saturation. In grounded theory research, data collection may be ended when the theoretical categories found to be emerging from the data are sufficiently “saturated” (Bowen, 2008). Saturation is reached when “the researcher gathers data to the point of diminishing returns, when nothing new is being added... no new themes are identified, and no issues arise regarding a category of data” (Bowen, 2008, p. 139; see also Breckenridge, 2009; Glaser & Strauss, 1967; Strauss & Corbin, 1990). Sampling for the present study was not explicitly carried out with the goal of theoretical saturation. However, while each participant clearly had a unique perspective, through the data collection and analysis process it became apparent that the same themes were emerging repeatedly and there was definitely a sense that the latter one to two participants were providing very little in the way of novel information. This insight gives some basis for confidence that a level of saturation was achieved in the study.

The aim of thick description is to provide sufficient information about participants, researcher, and researcher-participant relationships to enable the reader to judge how well the findings may transfer (Misco, 2007; Morrow, 2005). Studies should include extensive details about methods used and sufficient data to evaluate properly the conclusions reached from those data (Guba, 1981; Li, 2004; Miles & Huberman, 1994). The present study provided in-depth descriptions of the analytical process used and supported its findings with extensive verbatim interview extracts that give a rich flavour of the themes identified. The reflexive statement explores researcher-participant dynamics and their implications for the results produced. Overall, it is proposed that the present study had several features that suggest its findings should be transferable to other related contexts, in particular other Crown Court judges in England and Wales courts.

The qualitative nature of the analysis carried out also precluded drawing any conclusions about causal relationships between judges' perceptions of PMFs and their actual sentencing judgments (e.g. Guba & Lincoln, 1989). However, as discussed above, that was never the purpose of Study 2. Study 1 was designed to examine the relationship between PMFs and sentencing judgments. The aim of Study 2 was to enhance and illuminate Study 1's quantitative results, and suggest answers to several important questions that Study 1 could not address. It is proposed that Study 2 has achieved that aim.

4. Study 3

The Effect of Personal Mitigating Factors on Public Judgments of Sentence Fairness

4.1. Introduction

Studies 1 and 2 in this thesis provided valuable insights into the role played by character-based PMF in current sentencing practice. However, sentencers' judgments are not the whole story. It is also generally recognised that sentencers – and sentencing policy – ought to take some account of public opinion, for several reasons. First, democratic governments are accountable to their electorate through the sentencing policy they implement (Green, 1996; Hough & Kirby, 2013). Second, it has been argued that society's approach to punishment should reflect shared cultural values (Robinson & Darley, 2007; Ryberg & Roberts, 2014). Most importantly, however, public trust in the criminal justice system – a crucial element in the rule of law – will be damaged if sentencing is seen as unfair (Bingham, 2000; Henham, 2012; Hough & Kirby, 2013; Lord Carloway, 2013). For this reason, one of the stated goals of the Sentencing Council of England and Wales is “increasing public understanding of and confidence in sentencing and the criminal justice system” (Sentencing Council, 2016a, “Additional functions”). These arguments are addressed in greater depth in Chapter 1, pp. 26-28.

There is conflicting evidence about whether public opinion on sentencing outcomes differs from sentencing practice. Data from public surveys suggest that the majority of people judged criminal sentences to be too lenient (Dawes et al., 2011; Hough et al., 2013), and consider overly lenient sentencing the equal most important crime issue in Britain today (Ipsos MORI, 2010). However, studies suggest that if people are given detailed case facts

(via hypothetical vignettes or by acting as real jurors), their sentencing judgments may be at least as lenient as real sentencers (e.g., Hutton, 2005; Lovegrove, 2007; Ministry of Justice, 2013; Warner & Davis, 2012; Warner et al., 2016).

Research has found that public satisfaction with the criminal justice system may depend on perceptions of procedural justice, i.e., the fairness of the process, at least as much as distributive justice, i.e., the fairness of the outcome (e.g., Casper et al., 1988; Hough et al., 2013; Jackson et al., 2012; Tyler & Huo, 2002). One of the key elements required for procedural justice is *neutrality*, the expectation that legal principles will be applied consistently, that decision makers will be unbiased and that there will be transparency about how decisions are made (Tyler, 2006a). Sentencers' use of PMFs is an important part of the sentencing process; if it is to be perceived as fair, it should therefore correspond to some degree with public judgments about personal mitigation (Roberts, 2008). It follows that exploring public judgments about PMFs is important and can help inform the discussion about how those factors should be used in the sentencing process (Dhami, 2013b).

Several past qualitative studies have found only limited public support for the role of PMFs in sentencing domestic burglary (Russell & Morgan, 2001), causing death by driving (Hough et al., 2008), and sexual offences (Clarke et al., 2002; McNaughton Nicholls et al., 2012). Conversely, out of 13 factors tested, Hough et al.'s (2009) focus groups gave "high" significance to three PMFs (single parent, treated for depression, and youth), and "moderate" significance to four other PMFs (genuine remorse, under pressure from uncle, in drug treatment, and abused as a child).

Hough et al.'s (2009) conjoint analysis asked participants to decide whether offenders in four hypothetical property and four violent offence scenarios should receive a custodial sentence. For property offences, the four PMFs tested reduced the percentage of participants

choosing custody (43%) by the following amounts (approximately; precise figures were not given in the study): reparation = seven percent, drug treatment = five percent, in debt = four percent, abuse history = three percent, family pressure = two percent. For violent offences, the four PMFs tested reduced the percentage of participants choosing custody (38%) by the following amounts: mentally ill, remorse, job at risk all = four percent; abuse history = three percent. Hough et al. (2009) found no interactions between the PMFs tested, and concluded that the public evaluated PMFs independently from one another.

Hough et al. (2009) is the only study to date that has produced quantitative findings on public judgments about PMFs. Unfortunately, the study had several limitations (discussed in detail in Chapter 1, pp. 55-56). In summary, different PMFs were tested across the two offence types (property and violent), preventing any meaningful comparisons; insufficient detail was given regarding the methodology used; no tests of statistical significance were reported; no results were reported for the (lack of) interactions found between PMFs; and the study did not provide any useful comparative findings on the three character-based PMFs that are the subject of this thesis, since remorse was only tested for violent offences, addressing addiction was only tested for property offences, and good character was not tested at all.

The present study chose to examine public judgments about the same three PMFs that were examined in Study 1, namely remorse, addressing drug or alcohol addiction, and good character. (A detailed discussion of these PMFs can be found in Chapter 1, at pp. 19-21 and 45-50). Examining the same three PMFs allowed the findings of this Study (and those of Study 4) to be compared directly with Study 1, in order to evaluate whether public judgments about those PMFs are consistent with current sentencing practice.

The present study also examined a fourth PMF, assisting the prosecution, which arguably also relates to the offender's character. Assisting the prosecution is a statutory PMF

that allows the court to pass a reduced sentence to take account of assistance that the offender has given or agreed to give to a prosecutor or investigator in relation to his/her offence or any other offence (Serious Organised Crime and Police Act, 2005, (SOCPA 2005), s. 73). Legal precedent provides that an offender's sentence reduction should be considerable given the risks to which such offenders are exposed (*R v. P and Blackburn*, 2008) and substantial reductions are given in practice (Bureau of Investigative Journalism, 2012).

Psychological research suggests that individuals cannot accurately describe their own judgment policies and/or that traditional post-facto self-assessment approaches are ineffective for this purpose (Galotti, Tandler, & Wiener, 2014; Newell & Shanks, 2014; Nisbett & Wilson, 1977; Wegner, 2002, 2004; Wilson, 2002). Interview- or survey-based data are also susceptible to method biases, which may render them unreliable or invalid (Paulhus, 1991; Podsakoff et al., 2003; Podsakoff et al., 2012). Further, studies have found that people's experimentally captured judgment strategies predict their judgments significantly better than their self-reported strategies (e.g., Dhimi & Ayton, 2001; Dhimi & Harries, 2001; Konečni & Ebbesen, 1984; Sensibaugh & Allgeier, 1996; von Helversen & Rieskamp, 2009).

The present study therefore used an experimental approach to measure the effect of character-based PMFs on people's sentencing judgments, rather than using the self-assessment approach commonly taken by sentencing researchers in the UK (e.g., Hough et al., 2009; Jacobson & Hough, 2007). The study design was based on that used in other published research on variables influencing legal decisions generally (e.g., Dhimi & Ayton, 2001) and sentencing decisions in particular (e.g., Corwin, Cramer, Griffin, & Brodsky, 2012; Forsterlee, Forsterlee, Horowitz, & King, 2006; Higgins, Heath, & Grannemann, 2007; Loeffler & Lawson, 2002; Mueller-Johnson & Dhimi, 2010).

One other variable that may affect people's judgments regarding the importance of PMFs in sentencing is the sentence type that the offender is due to receive, for example a fine, a community sentence, or a prison term. Von Helversen and Rieskamp (2009) used a Bayesian modelling methodology to analyse the effect of various sentencing factors on German prosecutors' sentencing recommendations, based on data collected from the trial records of a single German court. Prosecutors were more influenced by AFs when giving fines but more influenced by MFs in general and remorse in particular when giving custodial sentences. This finding suggests that it is worth investigating whether the effect of the four character-based PMFs on people's sentencing judgments is influenced by the category of sentence that the offender in question received.

A novel behavioural approach to measuring public judgments about PMFs is to ask people to judge the *fairness* of sentence outcomes when different PMFs are present or absent in a case. Fairness judgments should reflect people's perceptions of distributive justice – the fairness of sentencing outcomes – and also procedural justice (e.g., Tyler, 2006a) – in terms of whether a given sentence can be justified in a case involving one PMF or another.

Judging the fairness of pre-existing sentences also reflects the relationship between the public and the sentencing process. Most people's experience of sentencing is limited to reading or hearing and reacting to media reports of sentences given (Green, 1996). Understanding how people respond to sentences can therefore help inform policy regarding how best to improve public awareness of sentencing and increase confidence in the sentencing process (in line with the goals of the Sentencing Council referred to above). No study to date has explored the effect of PMFs on public judgments of sentence fairness.

4.2. Aims and Objectives of the Present Study

The main aim of this study was to investigate whether people's judgments about the role of PMFs in sentencing align with how those factors are currently used in the criminal justice system. The study focused on three character-based PMFs, i.e., remorse, good character and addressing addiction. The PMF assisting the prosecution was also included in the study since it is arguably also character-based. The objectives were:

1. To examine the effect of individual PMFs on people's judgments of the fairness of criminal sentences, in terms of whether they are too harsh or too lenient.
2. To explore whether the effect of PMFs on sentence fairness judgments varies depending on the type of sentence involved, namely custody, a community sentence or a fine.
3. To compare people's experimentally captured judgments of the effect of PMFs on sentencing fairness against their stated views on the influence that those PMFs should have.

4.2.1. Hypotheses

There is very little empirical evidence on which to base a hypothesis about the relative effects of the four character-based PMFs on people's sentencing judgments. The findings from Hough et al. (2009), the only study to explore public judgments about the role of PMFs in sentencing, do not allow comparison between the four PMFs. The present study therefore was unable to make a priori predictions about the relative effects of the chosen PMFs on public judgments regarding sentence fairness. There was, therefore, only a general prediction made that all four PMFs would have a mitigating effect on judgments regarding sentence fairness.

Hypothesis 1 was, therefore:

*Participants will be significantly more likely to judge sentences as too harsh and less likely to judge sentences as too lenient when a PMF is present than when no personal mitigating factor is present.*²⁵

As regards the relationship between PMFs and sentence type, von Helversen and Rieskamp (2009) found that prosecutors were more influenced by remorse when giving custodial sentences. However, this was a study of prosecutors not the general public and it did not examine the other three character-based PMFs and so it does not provide reliable evidence on which to base a hypothesis for the present study. It was, therefore, decided to make only a general prediction that the effect of PMFs on fairness judgments would vary depending on the sentence type involved.

Hypothesis 2 was, therefore:

The effect of PMFs on participants' sentence fairness judgments will differ depending on the sentence type involved, i.e., custody, community sentence or fine.

As discussed above, there is extensive evidence that people's self-reported judgment policies tend to differ from the judgment policies that can be calculated from the actual judgments they make (Dhimi & Ayton, 2001; Dhimi & Harries, 2001; Konečni & Ebbesen, 1984; Sensibaugh & Allgeier, 1996; von Helversen & Rieskamp, 2009). For this reason, it was hypothesised that there would be a difference between participants' self-reported judgments about the importance of PMFs and the actual measured effect of PMFs on their fairness judgments.

Hypothesis 3 was, therefore:

²⁵ A one-tailed hypothesis was used here because all existing research on the chosen PMFs has found that they have a mitigating effect on sentencing judgments.

The effect of PMFs on participants' judgments of sentencing fairness will differ from participants' own stated views on the influence that those PMFs should have on sentencing.

4.3. Method

4.3.1. Participants

Participants were 45 Middlesex University students, recruited using the psychology department's online participant recruitment system. A power calculation using G*Power 3.1.3 (Faul, Erdfelder, Lang & Buchner, 2007) found that a sample size of 42 would achieve a power of 0.95 to detect a small-to-medium-sized effect (0.15) with an alpha of 0.05.

All but two of the sample were female²⁶. The sample's mean age was 19.91 (SD = 3.07). Some past research suggests that women may have more lenient attitudes to sentencing in general (Hough et al., 2013). However, there is no evidence that gender affects people's judgments about the importance of mitigation in sentencing (Hough et al., 2009, found no gender effect). Participants were 37.8% ($n = 17$) white, 28.9% (13) Asian, 17.8% (8) black, 13.3% (6) mixed ethnicity and 2.2% (1) other. Their political preferences were 55.6% (25) Labour, 11.1% (5) Liberal Democrat and 33.3% (15) other. 77.8% (35) said they had no experience of the criminal justice system, while 11.1% (5) had been a victim, 4.4% (2) had been a witness, and 6.6% (3) were otherwise involved.

4.3.2. Design

The study used a within-subjects, factorial design. This design was chosen because it has increased power to detect effects compared to a between-subjects design. Within-subjects designs are more powerful because they remove between-subjects variation; each participant is his or her own control. One downside of within-subjects designs is the potential

²⁶ The data was re-analysed with the two male participants removed and no significant differences were found in the results.

for carry-over effects (i.e. the response one condition may affect responses to subsequent conditions). To address this issue, the conditions in the present study were presented to participants in a random order.

There were two independent variables. The first, PMF had five levels: showing remorse, addressing drug/alcohol addiction, assisting the prosecution, good character, and none. The second independent variable, sentence type, had three levels: custody, community order and fine). This resulted in 15 experimental conditions.

4.3.3. Stimuli

Participants were presented with 15 short scenarios, each of which described an individual being convicted of non-domestic burglary and receiving a sentence. In each case, one (or none) of the PMFs was mentioned. A full copy of the stimuli is attached at Appendix 9.

A pre-test involving 12 participants was conducted to evaluate possible operationalisations of the PMFs and to obtain general feedback on the structure and content of the stimuli. Participants were asked to match each of eight possible operationalisations with one of the four PMFs. The four operationalisations that the pre-test participants matched with their associated PMFs most accurately were chosen for the study, as follows:

- *Showing remorse* – “[X] wrote a sincere letter of apology to the [victim].”
- *Addressing drug/alcohol addiction* – “[X] is now participating in a drug/alcohol rehabilitation programme.”
- *Assisting the prosecution* – “[X] assisted the police by giving them evidence about other offenders”.

- *Good character* - “[X] has volunteered for many years at a local homeless shelter.”²⁷
- *None* – No mention made of mitigating behaviour.

Three sentence types were used because they are the three options listed in the England and Wales sentencing guideline for burglary (Sentencing Council, 2011b). The operationalisations of each sentence type were chosen so that each was a plausible outcome for a mid-level case of non-domestic burglary, based on the current burglary guideline (Sentencing Council, 2011b). The three operationalisations were:

- *Custody* – “[X] received 12 weeks’ imprisonment.”
- *Community order* – “[X] received a community order consisting of 80 hours of unpaid work.”
- *Fine* – “[X] was fined 1½ times his weekly income.”

4.3.4. Measures

It was decided to measure fairness judgments rather than ask participants to actually choose sentences because this measure better reflects the public’s role in sentencing, i.e., responding to media reports of sentences given rather than deciding the sentences themselves. The dependent variable was participants’ judgments regarding the fairness of the sentence on a bipolar 7-point numerical rating scale, with -3 labelled “too lenient”, 0 labelled “just right” and 3 labelled “too harsh”. Research suggests that scales with 7 or more points produce more reliable and valid results (Preston & Coleman, 2000) but more than 7 points may place too many demands on respondents’ cognitive abilities (Weijters, Cabooter, & Schillewaert, 2010). In addition, having an odd number of points provides a neutral midpoint, which provides an option for participants who genuinely judge a given sentence to be “just right”.

²⁷ This operationalisation was chosen to best reflect the everyday reality of good character as a PMF (and distinct from no previous convictions), rather than a one-off exceptional act (see Chapter 1, pp. 48-50).

Participants were also asked how much influence each of the four PMFs should have on a criminal sentence. Responses were provided on a 7-point unipolar scale, with 1 labelled “no influence” and 7 labelled “a major influence”.

A question was also included to check whether participants perceived the operationalisations of the mitigating factors as they were intended to, i.e., as representing the PMFs that the study was designed to manipulate. No manipulation check question was required for the sentence type variable because each operationalisation actually included the name of the sentence type in its wording.

Finally, participants were asked to provide some demographic information: their age, gender, race/ethnicity, political preference, and whether they had any prior experience of the criminal justice system (as a victim, an offender, a witness, or otherwise).

4.3.5. Procedure

The study was presented to participants as an online survey, using www.surveymoz.com. The scenarios were presented to participants in a random order to minimise any order effects. The dependent variable was measured after each scenario by asking “How fair is this sentence?” After all 15 scenarios, participants were presented with the manipulation check item, the self-report measure and the demographic questions. Participants took approximately 20 minutes, on average, to complete the study and received no monetary or other compensation for taking part.

4.3.6. Ethical Considerations

Before commencing data collection, ethical approval for the study was obtained from the Middlesex University Psychology Research Ethics Committee (REF: PG2014-101214). The first page of the survey included a brief introduction to the study, confirmation of

participants' right to withdraw from the study at any time, assurance of anonymity and clarification regarding the use of any data collected. The second page requested consent from each participant. After taking part, participants were debriefed with a brief description of the aims and design of the study and were encouraged to contact the researcher if they had any questions or concerns.

4.4. Results

Descriptive statistics are provided below, followed by the findings in relation to each of the study's three hypotheses. Regression models are typically used to analyse data collected using policy capturing methodology. However, an analysis of variance (ANOVA) was chosen for this study as the study design had too few cases (i.e., scenarios) and too many predictor variables for a regression to be able to detect even a very large effect²⁸. The data were reviewed to establish whether they were suitable for analysis using an ANOVA. Normality was considered unlikely to be an issue given that the sample size was over 30 (Field, 2013). No statistical outliers were detected in the data²⁹. A 5x3 within-subjects ANOVA was therefore performed with PMF and sentence type as the independent variables and fairness score as the dependent variable.

4.4.1. Descriptive Statistics

Table 4.1 presents descriptive statistics for fairness ratings by each mitigating factor and sentence type.

²⁸ For a design with eight predictors (five mitigating factor levels and three sentence levels), Field (2013) states that approximately 110 cases are needed to detect a medium-sized effect with a power of 0.8²⁸, or roughly 14 cases per predictor. However, the present study had eight predictors and only 15 cases, i.e. 1.88 cases per predictor.

²⁹ Following Field (2013), z scores were reviewed with a score of 3.29 or more considered an outlier.

Table 4.1

Means, standard errors and 95% confidence intervals for mitigating factor and sentencing type by fairness rating.

Independent variable	Mean <i>fairness</i> (Std error)	95% CI [Low, high]
<i>Mitigating factor</i>		
Remorse	-0.58 (0.14)	-0.86, -0.29
Addressing drug/alcohol addiction	-0.30 (0.12)	-0.54, -0.05
Assisting prosecution	-0.81 (0.14)	-1.08, -0.54
Good character	-0.19 (0.11)	-0.41, 0.04
No PMF	-0.78 (0.12)	-1.03, -0.53
<i>Sentence type</i>		
Custody	-0.24 (0.15)	-0.54, 0.06
Community order	-0.72 (0.11)	-0.95, -0.50
Fine	-0.62 (0.14)	-0.89, -0.35

4.4.2. Tests of Hypotheses

Hypothesis 1. It was hypothesised that participants would be significantly more likely to judge sentences as too harsh and less likely to judge sentences as too lenient when a PMF was present than when no PMF was present.

Significance levels were adjusted to reflect a one-tailed test. There was a significant main effect of mitigating factor on fairness ratings, $F(4, 176) = 14.33, p < .001, \eta_p^2 = .246$. Planned contrasts were performed to compare each PMF to no PMF. The contrasts showed that addressing drug/alcohol addiction, $F(1, 44) = 19.76, p < .001, \eta_p^2 = .31$, good character, $F(1, 44) = 36.86, p < .001, \eta_p^2 = .46$, and remorse, $F(1, 44) = 3.66, p = .03, \eta_p^2 = .077$, produced significantly less negative fairness scores, i.e. away from “too lenient” and towards

“too harsh”, than cases involving no PMF. There was no significant difference between no PMF and assisting the prosecution, $F(1, 44) = .08, p = .22, \eta_p^2 = .00$). See Figure 4.1. The results therefore supported Hypothesis 1, with the exception of assisting the prosecution. It is noticeable that although addressing drug/alcohol addiction, good character, and remorse all had a significant mitigating effect, the effects of addressing drug/alcohol addiction and good character were much larger (4-6 times greater) than the effect of remorse. In addition, had hypothesis 1 been two-tailed rather than one-tailed, the effect of remorse would not have been significant.

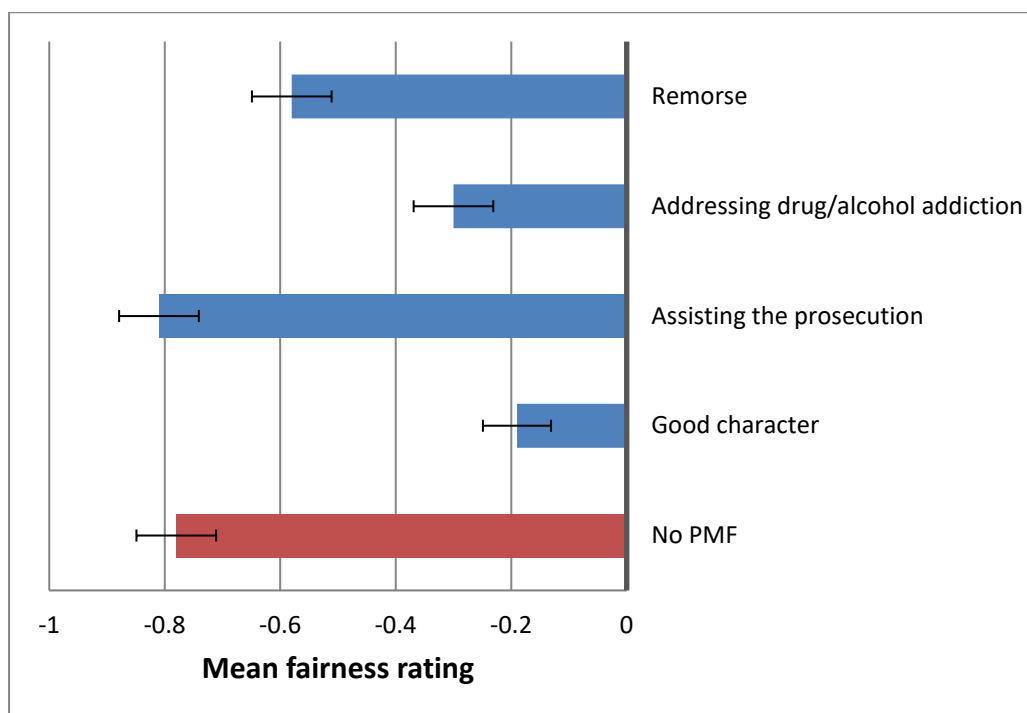


Figure 4.1. Mean fairness ratings by PMF. A mean fairness rating of -3 = “far too lenient”; 0 = “just right”; 3 = “far too harsh”. Error bars represent estimated 95% confidence intervals of the within-subjects variance only, following Cousineau (2005).

Hypothesis 2. It was hypothesised that the effect of PMFs on individuals’ sentence fairness ratings would differ depending on the sentence type involved, i.e., fine, community sentence or custody.

Hypothesis 2 was tested by examining the interaction between PMF and sentence type to determine whether the effects of PMFs on fairness judgments differed depending on the sentence type present in the scenario³⁰. There was a significant interaction effect of PMF by sentence type, $F(5.98, 287.21) = 6.68, p < .001, \eta_p^2 = .12$. Planned contrasts were performed to compare custody to community order and then fine. The contrasts revealed that the effect of addressing drug/alcohol addiction on fairness scores (compared to no mitigating factor) was significantly greater in the community order condition than in the custody condition, $F(1, 44) = 10.26, p = .003, \eta_p^2 = .19$, but did not differ significantly between custody and fine conditions, $F(1, 44) = 2.50, p = .121, \eta_p^2 = .054$. The interaction effect is illustrated in Figure 4.2. The effect of good character on fairness scores (compared to no mitigating factor) was significantly greater in the fine condition than in the custody condition, $F(1, 44) = 13.06, p = .001, \eta_p^2 = .23$, but did not differ between custody and community order conditions, $F(1, 44) = .66, p = .42, \eta_p^2 = .02$. This interaction effect is illustrated in Figure 4.3. Lastly, the effect of assisting the prosecution (compared to no PMF) was negative in the custody condition but positive in the community order condition, $F(1, 44) = 4.53, p = .039, \eta_p^2 = .09$. The interaction effect is illustrated in Figure 4.4. Hypothesis 2 was therefore also supported by the results but only to a limited extent.

³⁰ Mauchly's test indicated that the assumption of sphericity had been violated for the interaction effect ($\chi^2(35) = 62.48, p = .003$). Degrees of freedom were therefore corrected using Greenhouse-Geisser estimates of sphericity ($\epsilon = .75$).

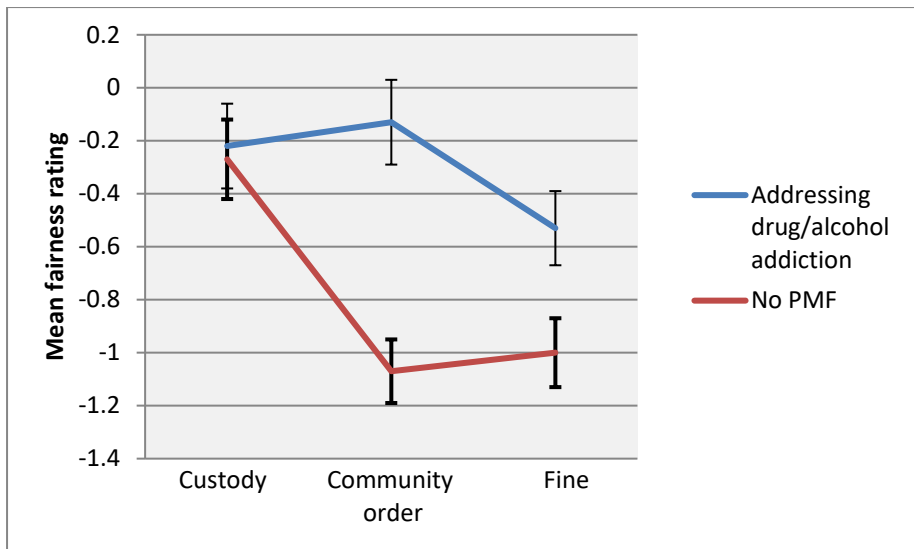


Figure 4.2. Mean fairness ratings by PMF and sentence type: addressing drug/alcohol addiction versus none. Error bars represent estimated 95% confidence intervals of the within-subjects variance only, following Cousineau (2005).

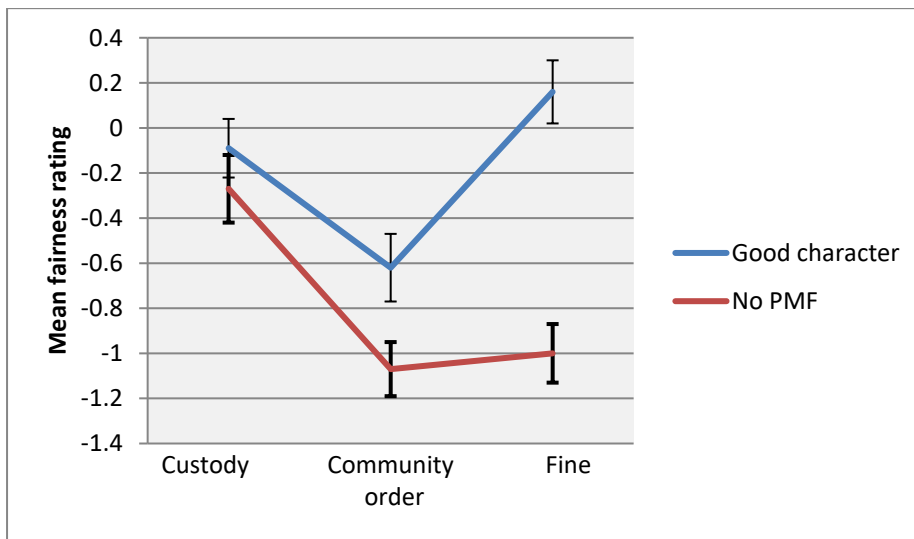


Figure 4.3. Mean fairness ratings by PMF and sentence type: good character versus none. Error bars represent estimated 95% confidence intervals of the within-subjects variance only, following Cousineau (2005).

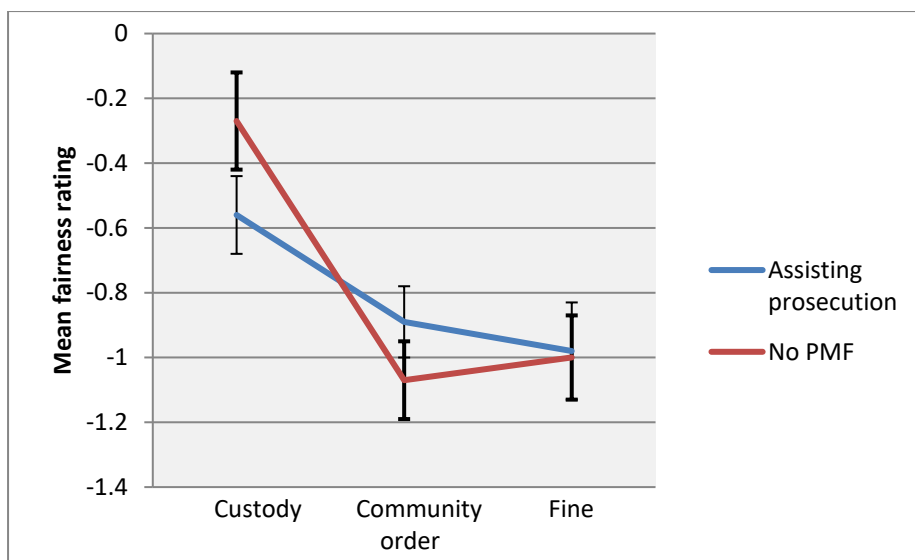


Figure 4.4. Mean fairness ratings by PMF and sentence type: assisting the prosecution versus none. Error bars are estimated 95% confidence intervals of the within-subjects variance only, following Cousineau (2005).

Hypothesis 3. It was hypothesised that the effect of PMFs on participants’ judgments of sentencing fairness would differ from their own stated views on the influence that those PMFs should have on criminal sentencing.

Two steps were required to test hypothesis 3. First, an analysis of participants’ responses to the self-report question regarding the influence that each of remorse, addressing drug/alcohol addiction, assisting the prosecution, and good character should have on a criminal sentence. Second, a comparison of the self-report data with the data obtained from the experimental manipulations.

On average, participants stated that all four mitigating factors should have some influence on criminal sentences. Means and standard deviations for each mitigating factor are presented in Table 4.2.

Table 4.2

Means and standard deviations for PMF influence ratings (out of a possible 7)

Mitigating factor	Mean influence rating (SD)
Remorse	4.07 (1.72)
Addressing drug/alcohol addiction	4.62 (1.67)
Assisting the prosecution	3.67 (1.77)
Good character	3.07 (1.89)

A one-way repeated measures ANOVA was performed with PMF as the within-subjects factor and participants' rating of the influence the mitigating factor should have on sentences as the dependent measure. The results showed that mitigating factor had a significant effect on influence rating, $F(3, 132) = 9.23, p < .001, \eta_p^2 = .173$. Post hoc tests were performed with Holm-Bonferroni sequential corrections (using Gaetano's 2013 calculator) as this approach controls for familywise Type I errors in a less conservative manner than ordinary Bonferroni corrections³¹. The tests revealed that addressing drug/alcohol addiction was rated significantly more influential than assisting the prosecution, $t(44) = 3.16, p = .003, d = .66, 95\% \text{ CI} [.17, 1.18]$, and good character, $t(44) = 4.91, p < .001, d = 1.03, 95\% \text{ CI} [.54, 1.58]$. However, addressing drug/alcohol addiction was not significantly different from remorse, $t(44) = 2.04, p = 0.48, d = .42, 95\% \text{ CI} [-.06, .93]$. Remorse was rated more influential than good character, $t(44) = 3.11, p = .003, d = .66, 95\% \text{ CI} [.16, 1.21]$ but no different from assisting the prosecution, $t(44) = 1.44, p = .157, d = .30, 95\% \text{ CI} [-.20, 0.82]$. Influence scores for assisting the prosecution and good character were not significantly different, $t(44) = 1.79, p = .081, d = .38, 95\% \text{ CI} [-0.14, 0.93]$.

³¹ Holm's (1979) sequential procedure ranks p values from lowest to highest and then applies a decreasing series of Bonferroni corrections. E.g., imagine a set of four p -values, $p_1 = .005, p_2 = .01, p_3 = .03$, and $p_4 = .04$, with an alpha of .05. p_1 is tested first at $.05/4 = .0125$, giving a significant result. p_2 is then tested at $.05/3 = .0167$ - also significant. p_3 is tested at $.05/2 = .025$ - the result was non-significant using the adjusted p value and so we can stop testing and conclude that p_4 is also non-significant.

A comparison of the self-report results with the fairness judgment results from the experimental study shows that the effect of PMFs on participants' judgments of sentence fairness did not correspond at all with participants' stated views on the influence that each PMF should have on sentencing. Table 4.3 shows a comparison of the rank order of PMF influence statistically derived from participants' fairness judgments and the rank order based on their self-report responses. A Kendall's tau-b correlation was computed between the two rank orders in order to test the level of similarity between them. Kendall's tau-b is a non-parametric test that estimates the relationship between two sets of ranked data. It is particularly useful for small data sets and there is evidence that it produces better correlation estimates than the more commonly used Spearman's rho (Field, 2013). There was a non-significant correlation of .000, $p = 1.00$.

Participants' self-report responses ranked remorse second and assisting the prosecution third in terms of the influence they should have on sentencing but the statistical analysis of participants' fairness judgments ranked remorse third and assisting the prosecution last, and the latter did not have a significant mitigating effect on participants' judgments of sentence fairness. Good character had the largest mitigating effect on fairness judgments but was ranked fourth most important (i.e., last) in participants' self-reports. Finally, addressing drug/alcohol addiction was ranked first in the self-report responses but had the second-largest effect on fairness judgments. Therefore, hypothesis 3 was supported.

Table 4.3

Rank order of PMF influence – statistically derived rank order versus self-reported rank order

Mitigating factor	Rank order (statistically derived)	Rank order (self- report)
Remorse	3	2
Addressing drug/alcohol	2	1

addiction

Assisting the prosecution	4	3
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Good character	1	4
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4.5. Discussion

This study examined how PMFs influence people's judgments of sentence fairness. Participants were asked to judge whether sentences passed across a set of burglary cases were too harsh, too lenient, or just right. Good character, addressing drug/alcohol addiction, and remorse all had a mitigating effect on people's judgments, i.e., made people more likely to judge sentences as too harsh and less likely to judge them as too lenient compared to cases where no PMF was present. Assisting the prosecution had no effect on fairness judgments. In addition, good character and addressing addiction had much stronger mitigating effects than remorse.

As predicted, addressing drug/alcohol addiction had a mitigating effect on participants' fairness judgments. The large effect found³² ($\eta_p^2 = .31$) is consistent with previous research into public perceptions of the importance of PMFs (Hough et al., 2009), as well as current Crown Court sentencing practice (Jacobson & Hough, 2007; Sentencing Council, 2014; see also Study 1 in this thesis, which found addressing addiction to be the strongest predictor of non-custodial sentences for both assault and burglary). The result is also consistent with Jacobson and Hough's (2007) finding that sentencers view addressing addiction as a particularly important factor for property crime, since such crime is often committed to fund drug dependency (see also Sentencing Advisory Panel, 2010).

Good character also had a significant mitigating effect on participants' judgments of sentence fairness, as predicted. The effect size was large ($\eta_p^2 = .46$). Public judgments about

³² The effect size descriptions used in this section are based on Cohen's (1988) designations.

good character have not been examined before, and so this is an interesting result given the controversial nature of good character as a PMF. Unlike many sentencing commentators (e.g., Ashworth, 2010, 2015; Maslen & Roberts, 2013; Murphy, 2006), participants in the present study clearly did consider it to be an acceptable PMF, and this is consistent with its frequent use by sentencers (e.g., Sentencing Council, 2014; Jacobson & Hough, 2007). However, good character had a much stronger mitigating effect in the present study than it appears to have in current sentencing practice (Sentencing Council, 2014; see also Study 1 in this thesis).

Remorse was found to be a significant mitigator but its effect ($\eta_p^2 = .03$) was small, much smaller than either good character or addressing drug/alcohol addiction. This finding conflicts with past studies of the public which have found that remorse was considered to be an important PMF (Hough et al., 2009; see also Maslen & Roberts, 2013). However, the results for remorse in the present study are consistent with those qualitative studies of public opinion that found only limited support for remorse as a PMF (Russell & Morgan, 2001; Clarke et al., 2002; Hough et al., 2008; McNaughton Nicholls et al., 2012). The results for remorse are also well-aligned with current Crown Court sentencing practice (Sentencing Council, 2014; see also Study 1 in this thesis, which found that remorse was amongst the weakest predictors of non-custodial sentences for both assault and burglary).

It could be that the weak effect of remorse in the present study reflected participants' scepticism about the sincerity of the offenders' remorse – the same issue was identified by Hough et al. (2008) in the context of causing death by driving. In fact, feedback received from pre-test participants suggested that believability of the offender's apology might be an issue and resulted in the final operationalisation of remorse in the study referring to a “sincere” apology. However, this may not have been enough to assuage participants' doubts

about the authenticity of the offenders' remorse. Alternatively, if participants were sceptical about remorse, this can be viewed as an accurate reflection of what is a problematic feature of remorse as a PMF. Obviously, remorse can only be relevant if it is sincere, and this involves a subjective judgment by sentencers that may be challenging in many cases. The judges interviewed by Jacobson and Hough (2007) and the Sentencing Advisory Panel's (2010) Advice on Overarching Principles of Sentencing both emphasised the importance of behaviour indicative of remorse (e.g., a letter of apology or attempts at reparation), rather than just words. This sincerity problem may also be part of the reason why remorse is not an influential factor in Crown Court sentencing practice (see Study 1 of this thesis). Lastly, some participants in the present study may have taken the view that remorse should not be a PMF at all. Bagaric and others have argued that since minimum standards of human decency require offenders to be contrite when they break the law, displaying that contrition should not result in a reduced sentence (e.g., Bagaric, 2014; Bagaric & Amarasekara, 2002; Lippke, 2008; Tudor, 2008).

Assisting the prosecution had no significant mitigating effect on participants' judgments of sentence fairness. On the contrary, there was actually a (non-significant) trend towards aggravation. People were more likely to judge a sentence "too lenient" and less likely to judge it "too harsh" when assisting the prosecution was present than when it was absent. There is no empirical research to compare this finding to but it is clearly inconsistent with the current provisions of the England and Wales criminal justice system, specifically SOCPA 2005.

One possible explanation for the lack of effect found for assisting the prosecution is that participants could have judged assisting the prosecution (or the specific operationalisation of "[X] assisted the police by giving them evidence about other offenders") to be morally questionable, and therefore not deserving of mitigation, as it involves betraying

friends or accomplices for one's own gain. The reality is that although assisting the prosecution can be viewed as moral in principle because it involves "doing the right thing" by cooperating with the authorities, in practice it is a mitigating factor based on pragmatism rather than legal or ethical principles. It is primarily designed to save the police and the courts time and money by acquiring evidence on other offences and/or offenders. Participants in the present study may not have been sufficiently aware of or valued this PMF's benefit to the criminal justice system. However, participants' self-reports suggested that they viewed assisting the prosecution as an acceptable PMF. This inconsistency may be related to the demand characteristics of the self-report method (Paulhus, 1991), in that participants may have felt they should rate assisting the prosecution as a PMF but did not actually rate it as important when judging sentence fairness.

The effect of PMFs on fairness judgments only differed according to sentence type in two particular contexts. First, addressing drug/alcohol addiction had relatively more impact on judgments of sentence fairness where a community order was involved compared to other sentences. This could indicate a connection in participants' minds between actions such as participating in a drug/alcohol rehabilitation programme and a decreased need for other forms of rehabilitative sentence such as unpaid community work. Hough et al. (2009) found that the public were particularly receptive to community penalties such as drug or alcohol treatment that are "specifically rehabilitative in orientation" (Hough et al., 2009, p. 12). Second, good character had relatively more effect on judgments of sentence fairness when a fine was involved compared to other sentences, perhaps because participants viewed it as a mitigating factor that was more relevant to cases involving relatively minor sentences. This latter result is a novel finding, as public judgments about good character have not been studied before.

Finally, participants' statistically-modelled judgments showing the influence of PMFs on sentencing fairness conflicted with their own stated views on the influence that those

PMFs should have. This finding adds to the considerable body of research confirming that people have difficulty accurately reporting their own judgment policies (e.g., Nisbett & Wilson, 1977; Newell & Shanks, 2014). It also supports past research (e.g., Dhimi & Ayton, 2001; Dhimi & Harries, Konečni & Ebbesen, 1984; Sensibaugh & Allegier, 1996; von Helversen & Rieskamp, 2009) which has shown that a behavioural approach to measuring judgments can reveal the judgment policies involved in legal decision making more accurately than using survey- or questionnaire-based studies.

4.5.1. Potential Implications

The present findings have potential implications for legal policy-makers, since some discrepancies seem to exist between the public's view of sentencing and current sentencing practice. Remorse, addressing addiction, assisting the prosecution and good character are all mitigating factors included in the England and Wales guideline for burglary offences (Sentencing Council, 2011b) and are used regularly as PMFs in the Crown Court (Jacobson & Hough, 2007; Sentencing Council, 2014; see also Study 1 in this thesis). However, only three of the four PMFs had a mitigating effect on people's judgments about sentence fairness.

The study's findings in relation to addressing addiction and remorse are relatively reassuring, since they are both broadly consistent with current sentencing practice. The findings for remorse do, however, contradict some past research on public opinion (Hough et al., 2009) and so further investigation would be useful. Based on the present findings for good character, policy makers might wish to consider whether more notice should be taken of an offender's positive contributions to society. Even Ashworth, a notable critic of good character as a PMF, acknowledges that "if the public expects account to be taken of positive social contributions, it will have less respect for a system that refuses to do so" (Ashworth, 2005, p. 183).

Participants' failure to accept assisting the prosecution as a PMF is a concern, given its status as a statutory MF that often results in substantially reduced sentences. Future research to explore this finding is suggested below.

Areas of disagreement identified between the public and sentencers can be used to inform the debate about future guidance on the use of PMFs in sentencing. For example, if the public believe that offenders with positive good character should have substantially reduced sentences, then the courts could consider emphasising that PMF more than is currently the case. The differences found in the effect of certain PMFs depending on the sentence type involved suggest that guidance on the use of PMFs should perhaps consider whether certain PMFs ought to be applied differently depending on the type of sentence being considered.

4.5.2. Proposals for Future Research

Both remorse and good character are particularly complex factors whose impact may depend substantially on the specific factual details of each case. More in-depth research is therefore required to understand how the public and sentencers interpret these two PMFs and to appreciate whether any substantial discrepancies really exist. For example, research could explore to what extent the effects of remorse and/or good character vary depending on the form these factors take in practice (for example, a verbal apology in court versus a letter of apology to the victim; being generally respected in a community through e.g., charity work versus a decorated military career).

Future research could also explore further the public's perception of assisting the prosecution as a mitigating factor. If there really is substantial public resistance to reducing sentences for those who collaborate with the authorities, that might require either a rethink of the legislation or a campaign to improve public awareness of the value of obtaining evidence

from offenders on other offenders' activities, particularly in the context of serious organised crime (which is the focus of SOCPA 2005).

Research could potentially also examine the relationship between PMFs and sentence type in more detail. For instance, it would be interesting to learn more about whether the public view PMFs differently depending on, for example, whether the sentence is likely to be a fine or a period in prison. It would also be useful to explore whether sentencers differ in their approach depending on the sentence involved. Unfortunately, the CCSS data used in Study 1 of this thesis could not be used to answer the latter question, as it does not provide enough detail on the length of community penalties or size of fines issued to analyse the impact of PMFs on those sentence types.

Lastly, the Sentencing Council is committed to improving public understanding of sentencing and increasing confidence in the sentencing process (Sentencing Council, 2016a). In order to achieve these goals, the Council needs to take account of discrepancies between public opinion and sentencing practice of the kind identified in the present study, so that those discrepancies can be reduced. There are two obvious steps required: first, we need to learn more about why the public may value certain PMFs differently from sentencers, and secondly we need to learn more about why sentencers use the PMFs in the way that they currently do. This knowledge can then be combined to identify areas of public concern and assuage those concerns by improving people's understanding of how and why PMFs are applied in sentencing cases.

4.5.3. Strengths and Limitations

The present study had some limitations. The use of a student sample is often criticised as limiting the generalisability of results to the wider population. However, most social psychological research into the effects of legal or extra-legal variables on sentencing

outcomes has also used student samples. In addition, the sample was diverse in terms of ethnicity, political preference, and experience of the criminal justice system.

The present study design involved isolating individual mitigating factors. This approach was purposely chosen to allow for accurate estimation of the effect of each PMF on the dependent variable of sentence fairness, and does reflect real-world sentencing where PMFs often occur separately. However, it is also true that multiple PMFs and/or AFs often occur together in one case, which was not represented in the present design; the findings may have less external validity as a result (see Dhimi, Hertwig & Hoffrage, 2004). Thus, there is a need to study PMFs in the context of other PMFs and AFs. This limitation was addressed in Study 4.

Despite these limitations, the present study also had many strengths that make it a useful contribution to research on public judgments about the role of PMFs in sentencing. First, the study used statistically powerful, within-subjects factorial experimental design, and provided full experimental results including significance tests, confidence intervals and measures of effect size. Second, the study provided a direct comparison of four PMFs that are central to the mitigation process. Lastly, the study used a dependent variable that reflects people's every-day experience of sentencing, i.e., rating sentence fairness based on brief summaries of sentencing outcomes.

5. Study 4

The Effect of Personal Mitigating Factors on Public Judgments of Sentence Length

5.1. Introduction

Study 3 in this thesis used an experimental approach to examine the independent effect on public sentencing judgments of the three character-based PMFs that are the focus of this thesis, as well as a fourth PMF, assisting the prosecution. Study 3 had limitations: each PMF was tested in isolation, and the data were analysed from a nomothetic perspective, i.e., aggregating the results across all participants. The present study aimed to build on the findings from Study 3 and also address the limitations of that Study.

Study 3's orthogonal design did not take account of the fact that multiple PMFs and/or AFs factors frequently occur together in sentencing cases (Sentencing Council, 2015a; see also the results of Study 1). As a result, Study 3 was relatively low on external validity as regards the structure of the task environment (Dhimi, Hertwig, & Hoffrage, 2004). The present study aimed to use a design that was more representative of the real-world sentencing environment, by examining the influence of PMFs on sentencing judgments in the context of other PMFs and also Aggravating Factors (AFs). The PMFs used in the present study were the same three character-based PMFs that were studied in Study 1 and Study 2, namely remorse, good character, and addressing addiction. Study 3 also included the PMF assisting the prosecution, but since that study found it to have no effect on public sentencing judgments (and it was, in any case, necessarily excluded from Study 1 since it is not recorded in the CCSS), it was not included in the present study.

The AFs selected for inclusion in the present Study were previous relevant convictions, being under the influence of alcohol/drugs at the time of the offence, and being on bail at the time of the offence. Previous convictions is a particularly important AF because it is so prevalent (e.g., it was present in 70% of domestic burglary cases in England and Wales in 2014 – Sentencing Council, 2015a). In addition, research suggests that sentencers view mitigation as less important for a frequent re-offender than for someone with no criminal history (Maslen, 2015a; Roberts & Pina-Sanchez, 2014).

Being under the influence of drugs/alcohol was included in the design because it is a common and also controversial AF. There is some academic debate about whether it should properly be considered an AF or a PMF (e.g., Padfield, 2011). While the England and Wales sentencing guidelines (e.g., Sentencing Council, 2011a, 2011b) list under the influence as an AF, there is evidence that some sentencers and some of the public may view it as a PMF (Irwin-Rogers & Perry, 2015; Lovegrove, 2011; but see Lightowlers & Pina-Sanchez, 2017). Finally, being on bail was included as a third AF. It was chosen because it was judged to be the most widely understood of three related and frequently occurring AFs: being on bail at the time of the offence, being on licence at the time of the offence, and failure to comply with current court orders. Being on bail therefore represents a category of AFs where the offender is subject to pre-existing court sanctions designed to prevent him or her committing an offence.

The present study (like Study 3) used an experimental methodology to measure the effect of character-based PMFs on people's sentencing judgments, rather than using survey, questionnaire or interview methods. This methodology deals with the well-recognised research findings that individuals cannot describe accurately their own judgment policies (Galotti et al., 2014; Newell & Shanks, 2014; Nisbett & Wilson, 1977; Wegner, 2002, 2004;

Wilson, 2002), and are susceptible to social desirability response bias when answering surveys or questionnaires (Paulhus, 1991; Podsakoff et al., 2003; Podsakoff et al., 2012).

Unlike Study 3, however, the present study used a person-by-person or “idiographic” methodology derived from social judgment theory (e.g., Cooksey, 1996; Doherty & Kurtz, 1996; Hammond et al., 1975 – for a fuller description, see Chapter 1, pp. 34-36). The idiographic designs used in social judgment theory (usually referred to as “policy capturing”) involve asking participants to make a series of judgments across a large number of scenarios, while systematically varying the variables (in this case PMFs and AFs) present in the scenarios. Those judgments can then be used to make a statistical model of how the variables tested influenced each individual participant’s judgments (that person’s “judgment policy”).

Using an idiographic design provides much richer data on the judgments made by a sample of individuals than can be obtained if data is only aggregated across the group. As well as illustrating the spread of judgment policies across the group, it is also possible to evaluate the level of agreement or disagreement between different individuals. Further, individual judgment policies can be compared with the judgments of the group as a whole. Finally, an idiographic approach allows for comparisons between people’s statistically derived judgment policies and their explicit self-reports about the relative importance of PMFs and AFs. Research shows that people’s statistically estimated judgment policies not only differ from their self-reports but also predict their judgments better, including in legal decision-making contexts (Dhami & Ayton, 2001; Konečni & Ebbesen, 1982, 1984; Sensibaugh & Allgeier, 1996; von Helversen & Rieskamp, 2009).

The ability to examine individual differences in judgments about PMFs is particularly useful for the present study. First, research suggests that individual sentencers’ approaches to mitigation vary considerably. The interview and focus group studies carried out by Davies

and Tyrer (2003), Hough et al. (2003), Jacobson & Hough (2007), and Raynard, Heberton and Pease (1994) all found substantial variation in judges' approaches to aggravating and mitigating factors. It is reasonable to expect that public judgments about the use of PMFs in sentencing may also vary considerably from individual to individual, but this has never been tested empirically. The present study's design makes it possible to do so.

In addition to the improvements described above, the present study also used a different measure of sentencing judgment from Study 3, namely participants' choice of custodial sentence lengths (in months). This was chosen as an alternative to the fairness measure used in Study 3. The measure used in Study 3 can be justified on the basis that it reflects the public's actual experience of sentencing. In comparison to Study 3, the present study's measure sacrifices a certain amount of external validity – the public do not have to make sentencing judgments – for a more direct measure of judgment that is more directly comparable with the findings on sentencers' judgments from Study 1 and previous research.

Overall, the measures used in Studies 3 and 4 have different advantages and disadvantages. The appeal of using both is that the results from the two studies can then be triangulated to produce a fuller picture of the public's judgment about the role of PMFs in sentencing than could be obtained by using either measure in isolation.

5.2. Aims and Objectives of the Present Study

The main aim of the study was to explore whether the public's judgments about the role of PMFs in sentencing are in line with current sentencing practice, by comparing the effect that the three PMFs of interest have on people's sentencing judgments. The study was focused on the three character-based PMFs, namely remorse, addressing drug/alcohol addiction, and good character. Four additional objectives were:

1. To compare the relative weight given by people to PMFs and to AFs when making sentencing judgments.
2. To measure the level of agreement or disagreement between different people's judgments about PMFs made on the same set of sentencing cases.
3. To compare the weight given by the public to PMFs and AFs in their statistically derived sentencing judgments with their self-reports about the relative importance of those same PMFs and AFs.
4. To explore possible interactions between the three PMFs of interest and/or between the PMFs and AFs.

5.2.1. Hypotheses

The present study's main aim and objectives were advanced through four specific hypotheses. Objective 4 (exploring possible interactions) did not have a specific hypothesis attached to it.

First, it was predicted Based on Hough et al.'s (2009) findings and the results of Study 3 in this thesis that addressing addiction, remorse, and good character would all have a mitigating effect on people's judgment of custodial sentence length. Given the conflicting evidence from Hough et al. (2009) and Study 3, it was not possible to make a prediction about the relative weight that would be given to each PMF.

Hypothesis 1 was, therefore:

Participants will choose significantly shorter custodial sentence lengths when a PMF is present in a case than when no PMF is present.

Second, it was predicted that the aggravating effect of AFs would be stronger than the mitigating effect of PMFs. The psychological phenomenon of negativity bias (Rozin & Royzman, 2001) predicts that negative information will have a stronger effect on judgment

than positive information, and Hough et al.'s (2009) results support this prediction. On average across all 15 AFs studied, 56% of Hough et al.'s participants judged that AFs always increases seriousness; 18% judged that AFs often increase seriousness; 11% judged that AFs sometimes increase seriousness; and 15% judged that AFs never increase seriousness or make no difference. By contrast, only 17% of Hough et al.'s participants judged that PMFs should result in a more lenient sentence in all cases; 51% judged that PMFs should result in a more lenient sentence in some cases; and 30% judged that PMFs should never reduce sentences (2% answered "don't know"). It is frustrating that different measures were used for AFs and MFs, and so the results are not directly comparable. However, there appears to be a trend towards people judging AFs to be more important than PMFs. In the conjoint analysis, for both offence types tested the AFs used had more influence than the PMFs on sentence lengths chosen.

Hypothesis 2 was, therefore:

PMFs will have significantly less effect on custodial sentence length than AFs.

It was also predicted that there would be substantial variation between people in terms of the relative importance of the three character-based PMFs and their importance relative to AFs. Variability in judgment about sentencing has been observed in qualitative studies of both the general public (Hough et al., 2009) and sentencers (Davies & Tyrer, 2003; Jacobson & Hough, 2007; Raynard et al., 1994; see also Study 2) but it has never before been assessed quantitatively, as in the present study.

Hypothesis 3 was, therefore:

There will be significant disagreement between participants' judgments about the influence of PMFs and AFs.

As discussed above, there is extensive evidence that people's self-reported judgment policies tend to differ from the judgment policies that can be calculated from the actual judgments they make (Dhami & Ayton, 2001; Dhami & Harries, 2001; Konečni & Ebbesen, 1982, 1984; Sensibaugh & Allgeier, 1996; von Helversen & Rieskamp, 2009). For this reason, it was hypothesised that there would be a difference between participants' self-reported judgments about the importance of PMFs and the actual measured effect of PMFs on their fairness judgments. In particular, it was predicted that people would have fewer PMFs in their statistically derived judgment policies than in their self-reports.

Hypothesis 4 was, therefore:

Participants' weighting of PMFs and AFs as measured by their statistically derived sentencing judgments will differ from their self-reports on the relative importance of PMFs and AFs.

5.3. Method

5.3.1. Participants

Participants were 40 members of the public. Eighteen were female. The mean age of the sample was 40.50 ($SD = 15.08$). A review of 74 studies that used a social judgment theory approach found the median sample size to be 38 (Dhami et al., 2004). Participants were recruited using a snowball technique, starting with friends and acquaintances and working outwards, as well as through advertisements on social media.

All participants described themselves as White. 35% ($n = 14$) had an annual household income of up to £29,999, 30% (12) between £30,000 and £49,000 and 35% (14) above £49,000. 60% (24) had a Masters or PhD, 35% (14) had a Bachelor's degree or equivalent, and 5% (2) had A-levels or equivalent. Their political preferences were 27.5% (11)

labour, 25% (10) conservative, 25% (10) liberal democrat, 12.5% (5) green, and 10% (4) other. 20 participants had no experience of the criminal justice system; five had been a victim, five a witness, and two an offender; six were lawyers (not necessarily criminal lawyers), two worked (or had worked) for the police, and nine had had other experiences (including a probation officer and a former forensic psychology student)³³.

5.3.2. Design

The study used a within-subjects design. A within-subjects design was necessary for this study because of the idiographic approach used, with each participant's data being analysed separately. Other benefits of within-subjects designs are discussed in Chapter 4.

There were six predictor variables: three personal mitigating factors (remorse, taking steps to deal with drug/alcohol addiction and good character and three aggravating factors (previous relevant convictions, offence committed while on bail, and being under the influence of drugs/alcohol). The three mitigating factors were chosen from those used in the author's previous studies to allow for comparison of results with those studies.

In order to test the independent effect of six predictor variables, the optimum approach would be a full factorial design, i.e., presenting participants with every possible combination of the six variables. However, this design would have required 64 (2^6) combinations of variables. Past studies have found that participants find it difficult to maintain concentration across more than approximately 40 cases (Dhami & Ayton, 2001). The present study therefore used a fractional factorial design, i.e., a proportion of the full 64 cases that is designed to retain a balanced, or orthogonal, distribution of variables across the stimuli. 32 cases were generated using the SPSS orthogonal design function (see Appendix 10). This is referred to as a 2^{6-1} design ($32 = 2^5$; Mee, 2009). Fractional factorial designs

³³ The figures for criminal justice experience do not add up to 40 as several of the participants had had experience of the criminal justice system in more than one context.

reduce a study's ability to separate out the individual effect of each variable, which can be an issue if too small a fraction of the full factorial design is used. However, the present study's 2^{6-1} design had a 'level VI resolution' (Mee, 2009), which means that the study was able to estimate the effects required to test the study's hypotheses, i.e., the main effects of all predictor variables as well as interactions between any two of the variables.

5.3.3. Stimuli

Participants were given the background facts of a hypothetical case of inflicting grievous bodily harm (GBH) and then 32 different cases containing different combinations of the PMFs and AFs (following the fractional factorial design in Appendix 10). For full details of the stimuli, see Appendix 11. The cases were presented in a random order, to prevent order effects from influencing the results. The variables were presented in the same order (when present) in each case, for ease of reading.

Different possible operationalisations of the PMFs were tested as part of a pilot for Study 1. Operationalisations of the AFs were not pre-tested as the variables were considered to be self-explanatory. The variables were operationalised as follows:

Aggravating factors (AFs)

- *Being under the influence of drugs/alcohol* – “[The offender] was drunk when he committed the offence”.
- *Previous relevant convictions* – “[The offender] has two previous convictions for assault.”³⁴
- *Offence committed while on bail* – “[The offender] was on bail at the time of the offence.”

³⁴ The number of previous convictions was set at two because it is the mid-point of one to three previous convictions, which the most common category listed in the 2013 Crown Court Sentencing Survey Report (Sentencing Council, 2014). Hough et al. (2009) also used two previous convictions as their middle category.

Personal mitigating factors (PMFs)

- *Remorse* – “[The offender] wrote a sincere letter of apology to the victim.”
- *Taking steps to address drug/alcohol addiction* – “[The offender] is now participating in a drug/alcohol rehabilitation programme.”
- *Good character* – “[The offender] has volunteered for many years at a local homeless shelter.”

5.3.4. Measures

After reading each case, participants were asked to choose a custodial sentence length in years and/or months. Custodial sentence length is a well-recognised outcome measure across the sentencing literature (e.g., Anderson & Spohn, 2010; Pina-Sánchez & Linacre, 2013; Ulmer & Johnson, 2004). The CCSS data analysed in Study 2 used a binary outcome variable of immediate custodial sentence or not. Including multiple different sentence types to choose from as well as or instead of sentence length would have made the design overly complex and potentially confusing for participants who, after all, do not have expert knowledge about the pros and cons and options available across different sentence types. It is hard to make a decision between custody and a non-custodial sentence without a comprehensive knowledge of the different non-custodial options available and how they operate in practice. Further, since custodial sentence length is a scale variable, it is amenable to multiple linear regression analysis. A binary variable such as custodial sentence or not would have to be analysed using logistic regression, which does not permit comparison of one regression model with another. The comparison of participants’ judgment policies is a key part of the methodology used in the present study as it is essential for evaluating variation among participants’ judgments.

Participants' self-reports on the relative influence that each of the six aggravating and mitigating factors should have on sentence length were measured using a seven-point bipolar numerical rating scale with verbal labels on the end- and mid-points of the scale (- 3 = "should significantly reduce the sentence", 0 = "should not affect the sentence", and 3 = "should significantly increase the sentence"). Research suggests that scales with 7 or more points produce more reliable and valid results (Preston & Coleman, 2000) but more than 7 points may place too many demands on respondents' cognitive abilities (Weijters, Cabooter & Schillewaert, 2010). Participants were also asked several demographic questions, namely their age, gender, ethnicity, political preference, highest level of education, household income, and whether they had any prior experience of the criminal justice system.

5.3.5. Procedure

The stimuli were presented to participants as an online survey, using Qualtrics survey software (www.qualtrics.com). The survey first showed the background facts of the GBH case with no additional aggravating or mitigating factors present. Underneath the case facts was a question: "How long a prison sentence should John receive?" followed by two drop-down boxes, one for years and one for months, so that participants could choose a sentence length. The following 31 pages displayed the cases with different combinations of AFs and PMFs specified by the fractional factorial design, one to each page. Each case was followed by the same drop-down boxes for sentence years and months. Participants had to choose a sentence length for each case before they could move onto the next page. The cases were presented in a different random order for each participant. After participants had chosen a sentence length for all 32 cases, they provided self-reports on the importance of the AFs and PMFs and answered the demographic questions.

5.3.6. Ethical Considerations

Before commencing data collection, ethical approval for the study was obtained from the Middlesex University Psychology Research Ethics Committee (REF: PG033-2015). The first page of the survey contained information equivalent to an information sheet and the second page requested consent from each participant. The last page of the survey contained a thorough written debrief and encouraged participants to contact the researcher if they had any questions or concerns.

5.4. Results

Three participants gave the same answer for all 32 cases. Their data were therefore excluded from the analysis.

5.4.1. Descriptive statistics

The grand mean custodial sentence length (in months) chosen across the 37 remaining participants over the 32 cases was 30 ($SD = 5.96$). Figure 5.1 presents the mean custodial sentence length for each participant, along with 95% confidence intervals.

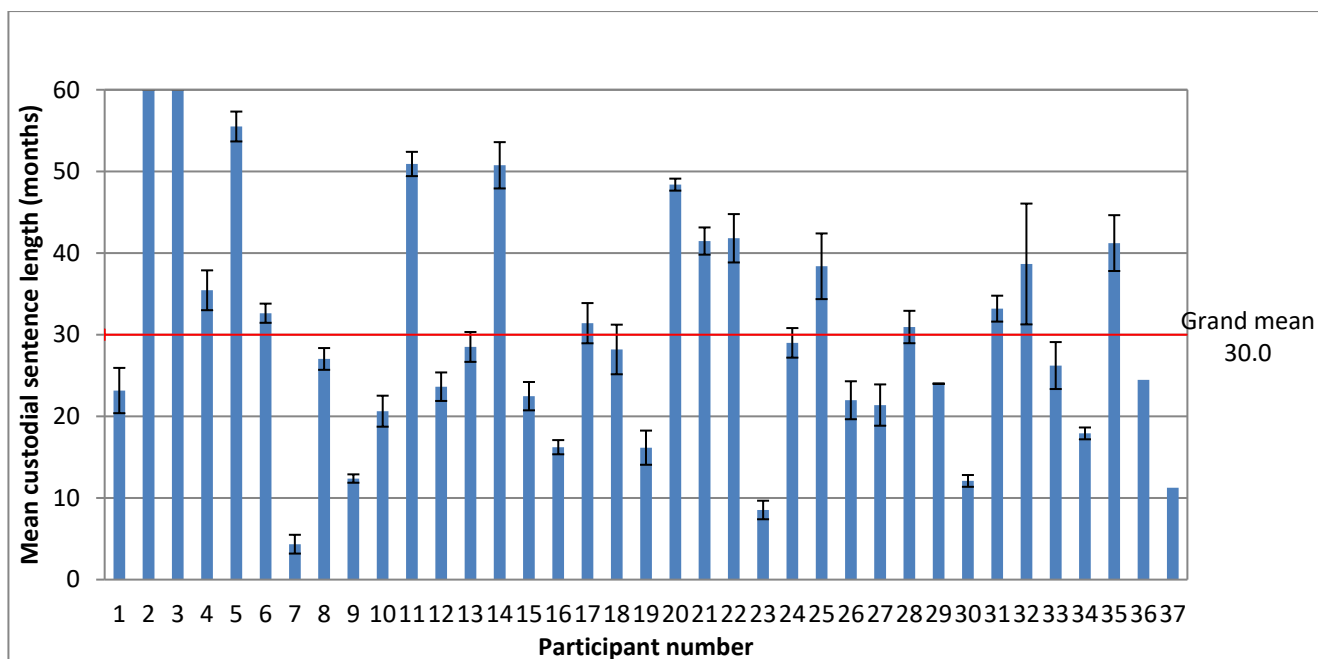


Figure 5.1. Mean custodial sentence length (months) by participant. Error bars are 95% confidence intervals.

5.4.2. Tests of Hypotheses

Hypothesis 1: *Participants will choose significantly shorter custodial sentence lengths when a PMF is present in a case than when none are present.*

Hypothesis 1 was tested and the present study's main aim was explored more generally by computing separate multiple linear regressions for each participant. The outcome variable was length of custodial sentence in months and the six predictor variables were: being under the influence of alcohol/drugs, previous relevant convictions, offence committed while on bail, remorse, taking steps to address drug/alcohol addiction, and good character. Where one or more sentencing factors produced statistically non-significant regression coefficients in a particular participant's regression model, those non-significant factors were retained in the final model. It can be argued that these should be removed and the regressions re-run without them. However, there were good theoretical reasons for

including all six factors in the models to begin with, i.e. they are recognised and commonly used aggravating and mitigating factors.

In addition, the aim of the experiment was to examine the effects of each of the three PMFs in the context of the other two PMFs and all three AFs, and the fractional factorial design was prepared for this purpose. Removing non-significant variables and re-running the analysis would mean estimating the effects of the other, significant, variables in the absence of non-significant variables. This approach is likely to cause the coefficients for the significant variables to change, but we want to know the effects of the significant variables when the non-significant variables are also present in the model. Consequently, it was considered appropriate to retain all factors in the models.

The R^2 value, p value, and b -weights (with 95% confidence intervals) for each individual regression analysis are set out in Appendix 12. Statistically significant regression models were obtained for 31 out of 40 participants. Only significant models were included in the following analyses. The set of significant factors contained in a given participant's regression model was taken to represent his or her judgment policy. It is acknowledged that deciding whether a given factor is part of an individual's judgment policy on the basis of whether its regression coefficient is significant in the individual's regression model is an imperfect way of representing individuals' cue use and comparing cue use across different individuals' judgment policies³⁵ (Beckstead, 2007). However, significance testing still provides a clear and well-recognised cut-off point for assessing which factors were more important to participants and which were less important and it remains a useful measure,

³⁵ If a given factor is statistically significant, it is reasonable to conclude that it is important to the judge and forms part of his or her judgment strategy but the converse does not necessarily apply. Significance tests of regression coefficients require different values to return a significant result across different individuals' regression models, since the R^2 figure for each model affects the calculation of significance (Beckstead, 2007). As a result, individuals' models can have varying power to detect significant results and so comparison between models can be misleading.

provided its limitations are recognised and it is combined with other approaches such as the graphical representation of participants' judgment policies contained in Figures 5.3a and 5.3b.

5.4.2.1. Aggregated results. On average across all participants, the predictor variables explained 66% of the variability in participants' choice of sentence length (mean $R^2 = .66$, $SD = .15$). Table 5.1 shows mean, minimum and maximum b -weights and standard deviation for each sentencing factor produced by the individual multiple linear regressions, aggregated across all participants. The b -weight for each sentencing factor represents the number of months' difference in custodial sentence length that the presence of that factor predicts. Table 5.1 shows that all three PMFs were associated with reduced custodial sentence lengths (i.e. they had a mitigating effect). Paired sample t -tests found that the difference between the mean b -weights of addressing addiction and remorse ($-.64$, BCa 95% CI³⁶ $[-.1.54, .21]$) was not significant, $t(30) = -1.40$, $p = .172$. The difference between remorse and good character ($-.64$, BCa 95% CI $[-1.51, .27]$) was not significant either, $t(30) = -1.36$, $p = .184$. However, addressing addiction had a significantly larger mean b -weight than good character (difference = -1.28 , BCa 95% CI $[-2.07, -.53]$, $t(30) = -3.16$, $p = .004$). All three AFs were associated with increased custodial sentence lengths (although under the influence was a fairly weak predictor).

None of the PMFs was a significant predictor for more than 50% of participants: PMFs were significant predictors for 48.39% (Addressing drug/alcohol addiction), 45.16% (remorse), and 25.81% (good character) of participants, respectively. Conversely, 77.42% of participants' models included previous convictions as a significant predictor, and 51.61% included on bail. Under the influence was only a significant predictor for 9.68% of participants, and its effect did not reach significance. Figure 5.2 presents graphically the

³⁶ Bias corrected and accelerated 95% confidence intervals were calculated for all t -tests, using 1000 bootstrap samples (Field, 2013).

mean b -weights for each of the AFs and PMFs, in terms of the difference in custodial sentence length associated with them. AFs are in red and PMFs are in blue.

Table 5.1

Summary of multiple linear regression analyses across 31 participants who had statistically significant regression models

	% (no.) for whom factor was significant	Mean b (SD)	Range From, to	t	p
<i>Aggravating factors</i>					
Under the influence	9.68 (3)	0.29 (1.92)	-3.75, 4.13	0.85	.400
Previous convictions	77.42 (24)	5.51 (5.21)	-0.813, 21.94	5.89	<.001
On bail	51.61 (16)	4.36 (5.77)	-1.06, 29.94	4.21	<.001
<i>Personal mitigating factors</i>					
Remorse	45.16 (14)	-2.20 (1.69)	-5.88, 1.19	-7.23	<.001
Addressing drug/ alcohol addiction	48.39 (15)	-2.84 (2.16)	-8.25, 0.69	-7.33	<.001
Good character	25.81 (8)	-1.56 (1.89)	-7.75, 1.13	-4.59	<.001

Note: The figures given are for the unstandardised coefficient b , as this describes the amount of difference, in months, that the presence of each sentencing factor made to the sentence length chosen. The standardised coefficient was not needed because every factor is binary (present/absent) and so they are directly comparable with one another. t scores and p values are for a one-sample t -test of mean b compared to 0, following Lorch and Myers (1990).

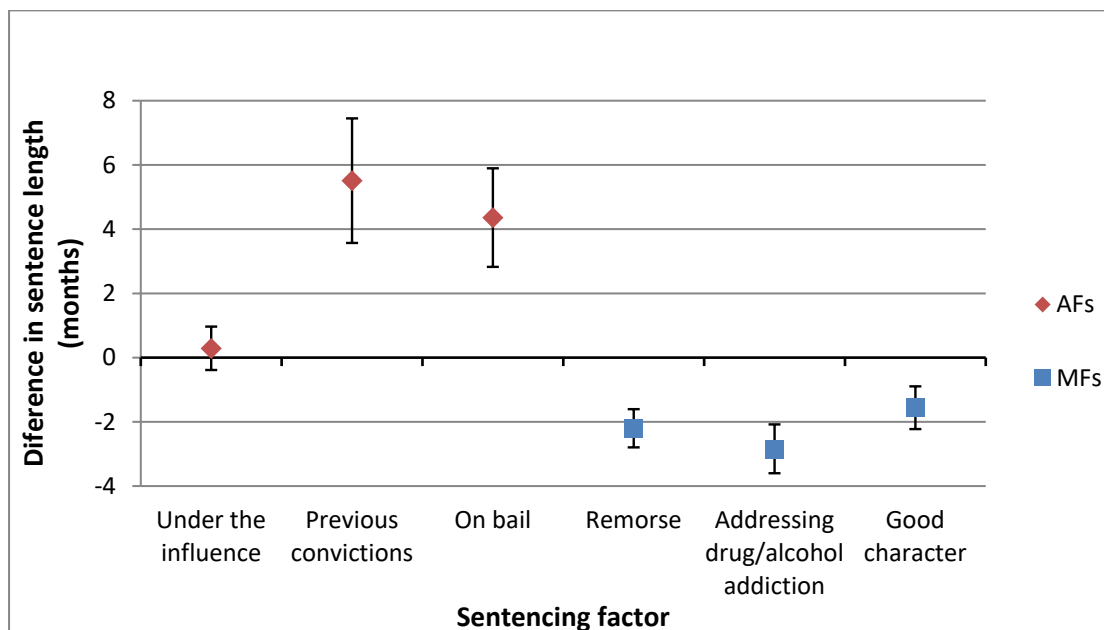


Figure 5.2. Mean b -weights by sentencing factor, aggregated across all participants with a significant regression model for the sentencing factors. Error bars are 95% confidence intervals.

Overall, the aggregated data from the regression analysis supported Hypothesis 1, because all three PMFs predicted reduced sentence lengths. However, the data also provided a clear indication that support for the PMFs was not universal across participants. This finding was explored further using the regression models calculated for each individual participant.

5.4.2.2. Regression results for individual participants. Figures 5.3a and 5.3b show the b -weights for each of the MFs and AFs for each participant's regression model. The data for participants 1, 2, 3, 9, 10, 20, 21, 29, and 39 do not appear in the figures, since their regression models were not significant.

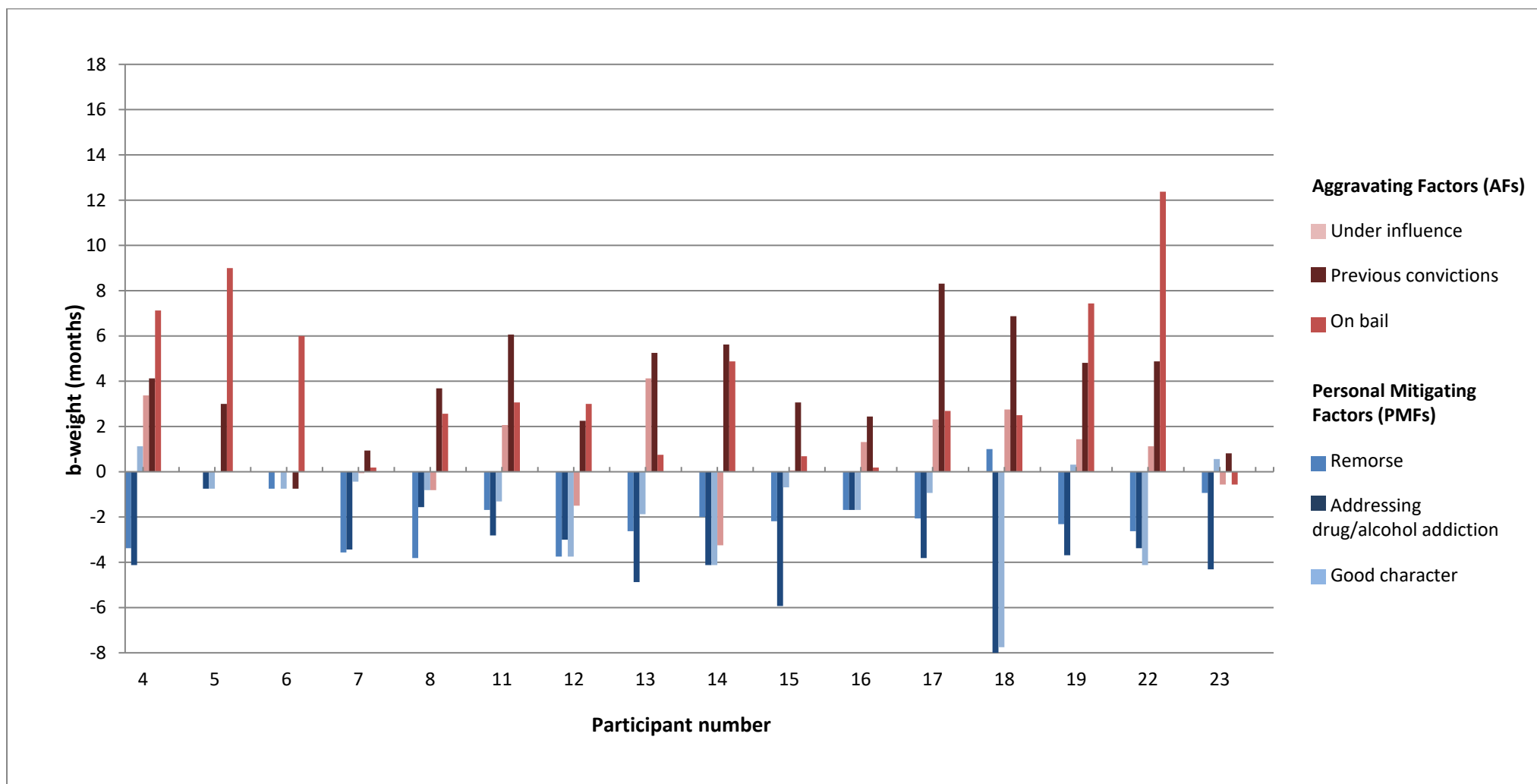


Figure 5.3a. Distribution of b -weights for each PMF and AF for participants 4 to 23. Only participants whose regression models were significant are shown.

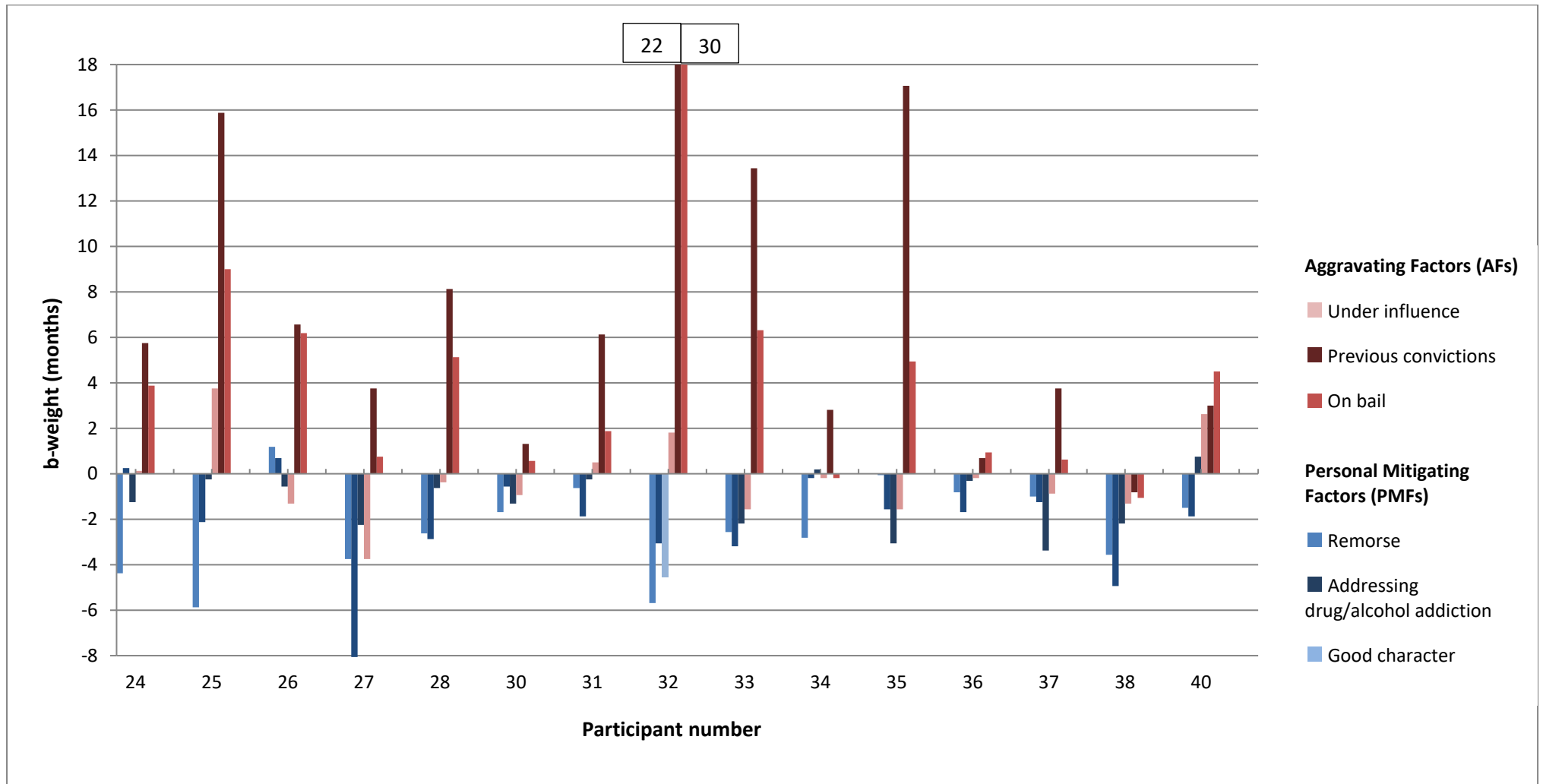


Figure 5.3b. Distribution of *b*-weights for each PMF and AF for participants 24 to 40. Only participants whose regression models were significant are shown.

The study next examined the number of statistically significant sentencing factors contained in participants' judgment policies, in order to explore participants' use of the different factors in their sentencing judgments. Between one and six significant sentencing factors were included in participants' regression models (mean = 2.58). The mean number of PMFs included was 1.19; the mean number of AFs was 1.39. A paired samples t-test found that the difference between the two means ($-.20$, BCa CI $[-.61, .26]$) was not significant, $t(30) = -.88$, $p = .385$. The number of factors used across all participants is shown in Figure 5.4.

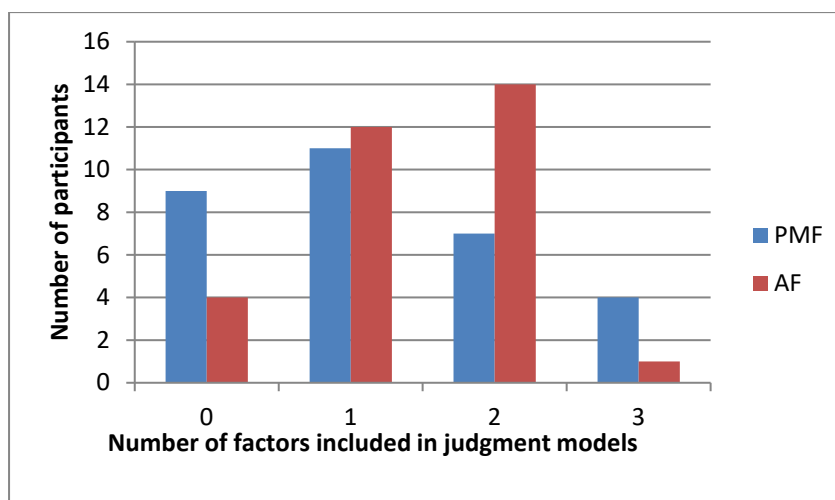


Figure 5.4. Number of personal mitigating factors and aggravating factors included in participants' judgment policies.

Participants' use of PMFs was analysed in more detail, in order to explore which PMFs were more or less commonly used and in what combinations. For nine participants, none of the PMFs were significant predictors of custodial sentence length. Across the remaining 22 participants, where PMFs did predict sentence length they were always associated with shorter sentence lengths, i.e., had a mitigating effect. For 11 participants, only one PMF was a significant predictor. Addressing drug/alcohol addiction was the most common sole predictor (five participants), followed by remorse (four participants) and good character (two participants). Remorse and taking steps to address drug/alcohol addiction were both significant predictors for five participants; remorse and good character were both

predictors for one participant; and addressing drug/alcohol addiction and good character were both predictors for one participant. Lastly, there were four participants for whom all three PMFs predicted a reduced custodial sentence length.

Finally, a two-step cluster analysis was carried out using SPSS (following Mooi & Sarstedt, 2011) to determine whether participants could be classified into groups based on their choice of PMFs and/or AFs and the weights given to those factors. Four distinct clusters of participants were found in the data. Cluster 1 (“AF-dominant, weakly influenced”) comprised 11 people for whom bail and previous convictions had a slightly weaker than average aggravating effect, and under the influence was a (very weak) mitigator. Addressing addiction and remorse were much weaker than average, while good character was only slightly below average. Cluster 2 (“PMF-dominant”) comprised 10 people for whom, like Cluster 1, bail and previous convictions were slightly weaker than average and under the influence was a weak mitigator. For Cluster 2, however, remorse was a little stronger than average, and addressing addiction and good character were much stronger than average. Cluster 3 (“balanced, all factors strong”) contained eight people who judged bail and previous convictions to be a little stronger than average, while under the influence was a weak AF. For Cluster 3, remorse had an average effect, good character was a little stronger than average, and addressing addiction was much stronger. Lastly, the two people in Cluster 4 (“AF-dominant, strongly influenced”) judged all three AFs to be very strong aggravators indeed. Remorse was also very strong and good character stronger than average, but addressing addiction was weaker than average. Overall, Cluster 4 judged AFs to be much more important than PMFs.

Another pattern that emerged from the cluster analysis concerns the relationship between the AF under the influence and the PMF addressing addiction. Two clusters (21 people) judged under the influence to be a (weak or very weak) MF. These people were

divided into those who were also largely uninfluenced by the offender's attempts to address his addiction (Cluster 1), and those who saw that as an important MF (Cluster 2). For the other two clusters (10 people), under the influence was an AF. For Cluster 3, the aggravating effect was weak and addressing addiction had a strong balancing impact, while for Cluster 4, the aggravating effect was strong and addressing addiction had relatively little impact.

The data from individual participants shows that only four participants (out of 31) had judgment policies that included all three PMFs, and nine participants had no PMFs in their judgment policies at all. In addition, none of the three PMFs was included in more than 50% of participants' judgment policies. The most that can be said is that some of the PMFs reduced some people's chosen sentence lengths some of the time. Therefore, the idiographic data only support Hypothesis 1 to a limited extent.

Hypothesis 2: *PMFs will have significantly less effect on custodial sentence length than AFs.*

The effects of the three PMFs and three AFs on sentence length were compared by carrying out paired sample t-tests on the regression coefficients aggregated across all participants. The negative sign of the personal mitigating factor coefficients was reversed to facilitate the comparison. The aggravating effect of previous convictions on sentence length was significantly greater than the mitigating effect of remorse (difference = 3.17, BCa 95% CI [1.66, 4.96], $t(30) = 3.59$, $p = .001$), addressing drug/alcohol addiction, (difference = 2.61, BCa 95% CI [.66, 4.59], $t(30) = 2.60$, $p = .014$), or good character (difference = 3.76, BCa 95% CI [2.13, 5.72], $t(30) = 4.20$, $p < .001$). The aggravating effect of an offender being on bail was also greater than the mitigating effect of remorse (difference = 2.02, BCa 95% CI [.30, 4.26], $t(30) = 2.09$, $p = .045$), or good character (difference = 2.62, BCa 95% CI [.84, 4.70], $t(30) = 2.63$, $p = .013$), but was not significantly different from addressing drug/alcohol addiction (difference = 1.46, BCa 95% CI [-.44, 3.78], $t(30) = 1.29$, $p = .207$). However, all

three PMFs had greater mitigating effects than the aggravating effect of being under the influence (remorse – difference = -2.04, BCa 95% CI [-2.82, -1.30], $t(30) = -5.09$, $p < .001$; addressing addiction – difference = -2.61, BCa 95% CI [-3.71, -1.69], $t(30) = -5.24$, $p < .001$; good character – difference = -1.45, BCa 95% CI [-2.36, -.58], $t(30) = -3.08$, $p = .004$). Hypothesis 2 was therefore partially supported. All three PMFs had weaker effects than previous convictions, and remorse and good character had a weaker effect than on bail. However, all three PMFs had stronger effects than under the influence.

Participants did not include significantly more AFs than PMFs in their judgment policies. However, the two factors most likely to be included were both AFs, namely previous convictions (77.42% of policies) and on bail (51.61% of policies). The cluster analysis showed that one cluster (eight people) was relatively balanced between AFs and PMFs, two clusters (13 people) emphasised AFs over PMFs, and one cluster (ten people) emphasised PMFs over AFs.

Hypothesis 3: *There will be significant disagreement between participants' judgments about the influence of PMFs and AFs.*

The findings supported hypothesis 3. Participants' judgment policies varied widely in both the number and choice of PMFs and AFs that they contained. The disagreement amongst participants is clearly illustrated in figures 5.3a and 5.3b.

Hypothesis 4: *Participants' weighting of PMFs and AFs as measured by their statistically derived sentencing judgments will differ from their self-reports on the relative importance of PMFs and AFs.*

The mean rank orders participants gave to each PMF and AF were calculated, based firstly on participants' statistically derived judgment policies and secondly on their self-

reports. Figure 5.5 shows that participants' statistically-modelled ranks differed more from their self-reports for AFs than for PMFs.

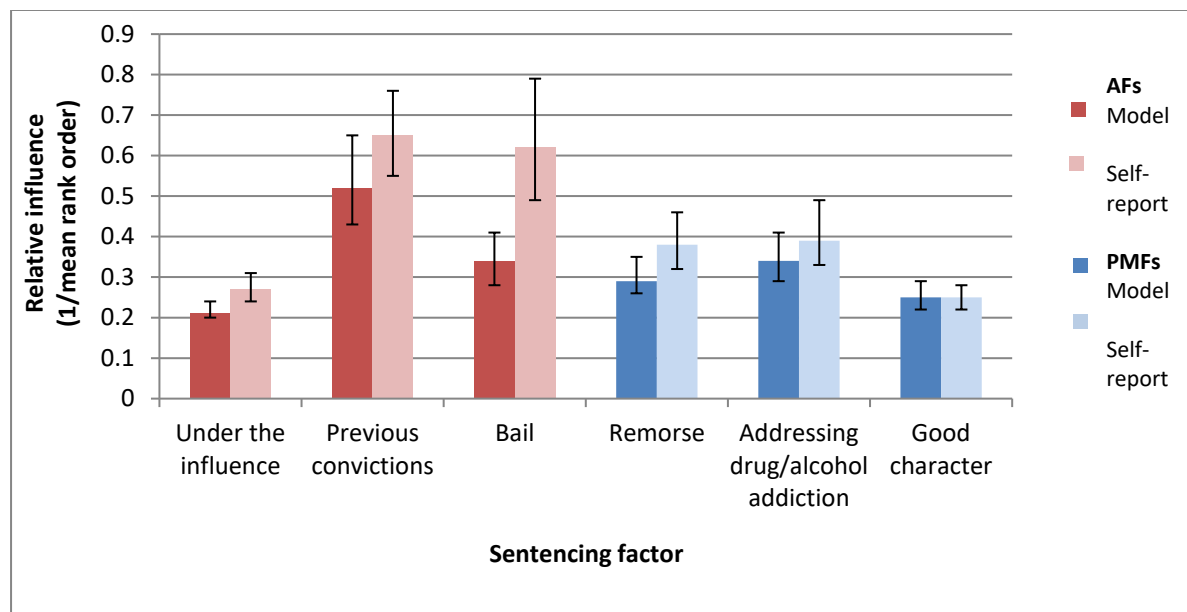


Figure 5.5. Relative influence of AFs and MFs on custodial sentence length based on mean rank order from statistically-modelled judgment policies and self-reports. Error bars are 95% bias-corrected accelerated bootstrap confidence intervals.

Kendall's tau-b correlations were also calculated between the rank order given to the PMFs and AFs by each participant (based on the coefficients in his/her linear regression model) and the rank order of factors given in that participant's self-report (see Dhimi & Ayton, 2001). Factors in the regression model were ranked based on their coefficients' distance from zero, in order to compare AFs (which have positive coefficients) and PMFs (which have negative coefficients). The resulting correlations between participants' regression models and self-reports ranged from $-.73$ (a large negative correlation) to 1 (a perfect positive correlation); the mean correlation value was $= .41$ (a medium-sized positive correlation), with a standard deviation of $.47$. There were nine significant correlations out of 31 (all positive).

In addition, a paired-samples t-test was used to compare the number of PMFs and AFs included in participants' statistically-derived judgment policies with the number of PMFs and AFs that participants stated in their self-reports should influence sentences. On average, participants included fewer sentencing factors in their judgment policies (mean = 2.61, SD = 1.38) than in their self-reports (mean = 4.81, SD = .98). The difference, -2.19, BCa 95% CI [-2.74, -1.65], was significant, $t(30) = -7.95, p < .001$.

In conclusion, the aggregated results show a medium-sized correlation between the relative importance given to PMFs and AFs in participants' statistically derived judgment policies and in their self-reports. However, participants included fewer PMFs and AFs in their judgment policies than those they rated as valid PMFs and AFs in their self-reports. In addition, when the individual results are examined, it is clear that participants varied widely in the correlation between their self-reports and their judgments as calculated using a regression model. This finding partially supports hypothesis 4, and suggests that there are substantial individual differences in people's ability to report their own judgment policies.

5.4.3. Interactions Between PMFs and Other PMFs/AFs

Further regression analysis was used to identify interactions between the variables, i.e., determine whether the effect of any of the PMFs and/or AFs in participants' judgment policies was influenced by the presence of any other PMF or AF. The presence or absence of each two-way interaction was determined based on an *F*-test of whether a participant's regression model including the interaction between two specified predictor variables (coded using four dummy variables) had significantly better predictive power than the model containing only the main effects of the six predictor variables. The results for each participant are recorded in Appendix 13.

Thirteen participants (41.9%) had one or more significant interactions in their regression model. Six participants (19.4%) had two or more interactions (three had two interactions, one had three interactions, and two had four interactions). Participants varied widely regarding which variables interacted in their model. The most commonly occurring interactions were a positive interaction between remorse and addressing addiction, and a positive interaction between good character and under the influence, each of which occurred three times. This means that for three participants, remorse had a weaker affect when it was present alongside addressing addiction, and vice versa (interactions in regression analysis are symmetrical). For three other participants, good character had a weaker effect when it was present alongside under the influence, and vice versa.

5.4.4. Relationships Between Demographic Variables and PMF Judgments

Exploratory bivariate regression analyses were carried out to examine whether any of the demographic variables recorded in the study significantly predicted the importance given to the three PMFs of interest in participants' sentencing judgments. This means that each of gender, annual household income, level of education, and political preference was regressed separately against the mean beta-weight for each PMF. Bivariate regression was used because the ratio of predictor variables to cases was too high to include all of the demographic variables in one multiple linear regression model. Bivariate regression can only provide a preliminary indication of a possible relationship between two variables. In the event, the analysis found no significant relationships between any of the demographic variables and the mean *b*-weights of any of the three PMFs tested. Chi-square tests were carried out to explore whether there was any relationship between demographic variables and participants' membership of the clusters identified via cluster analysis. No significant relationships were found between gender, income, education level or politics and cluster membership.

5.5. Discussion

It is generally agreed that public opinion is relevant to criminal sentencing (e.g., Bingham, 2000; Hough & Kirby, 2013). One important aspect of sentencing is personal mitigation, and there is currently a dearth of research on public opinion regarding the role of PMFs in sentencing (e.g., Roberts, 2008). The only existing empirical study of public opinion in relation to specific PMFs (Hough et al., 2009) had many limitations and did not focus on the three character-based PMFs that are central to this thesis, namely remorse, addressing addiction, and good character. Study 3 in this thesis addressed several limitations of Hough et al. (2009) and did focus on character-based PMFs. However, each PMF was tested in isolation, the study used a student sample, and the research took a nomothetic approach, producing aggregated data only.

The present study had a demographically diverse non-student sample and used an idiographic experimental approach to examine the relationship between the three character-based PMFs and people's choice of custodial sentence length. The study explored the effect of the three PMFs when they occur with each other and/or with three common AFs, namely previous convictions, being on bail at the time of the offence, and being under the influence at the time of the offence. The study also examined each participant's data separately and explored variations amongst participants' judgments and between participants' statistically derived judgment policies and their self-reported judgments.

The study first calculated the weight of the PMFs as predictors of reduced sentence length judgments, aggregated across all participants' judgment policies. The aggregated results for addressing addiction are consistent with past research on public judgments (Hough et al., 2009; Study 3 in this thesis), as well as current sentencing practice (Jacobson & Hough, 2007; Study 1 in this thesis). Both the public and sentencers judge addressing addiction to be

an important factor in sentencing. The aggregated results for good character suggested a relatively weak mitigating effect. This finding is also consistent with the findings of Study 1 in this thesis and Jacobson and Hough (2007) regarding sentencing practice. However, it conflicts somewhat with Study 3 in this thesis, where good character was found to have a large effect on people's judgments about sentencing fairness. Nevertheless, the present results re-confirm that the public judge good character to be an acceptable PMF, despite the arguments for its exclusion put forward by commentators such as Ashworth (2010, 2015), Maslen and Roberts (2013), and Murphy (2006).

The present study's aggregated results for remorse were also at odds with Study 3, which found only a very small mitigating effect for remorse. In addition, the aggregated findings suggest that the public may judge remorse to be a more important factor than sentencers do: remorse was as strong a predictor of a reduced sentence as addressing addiction, and was a stronger predictor than good character. Conversely, Study 1 found remorse to be a much weaker predictor of non-custodial sentences in the Crown Court than addressing addiction, and very similar to good character.

The interactions found between PMFs challenge Hough et al.'s (2009) conclusions that the public's model of aggravation and mitigation is essentially additive. The present study suggests that the public's approach is actually rather more like the approach taken by sentencers (based on the results of Study 1), namely, the presence of one PMF can influence the effect of another. However, people's judgments about *which* PMFs should affect one another and *how* were found to vary widely.

The finding that all three PMFs predicted a reduced sentence less strongly than the AFs previous convictions and on bail predicted an increased sentence reflects previous research on both the public and sentencers (Hough et al., 2009; Jacobson & Hough, 2007; see

also Study 1). The exception to this AF dominance was under the influence; its mean predictive weight was negligible and participants were divided as to whether it should be an AF or a PMF. Participants' ambivalence to under the influence is at odds with current sentencing principles and practice for assault, which treat under the influence as an AF (Lightowlers & Pina-Sanchez, 2017; Sentencing Council, 2011a).

The idiographic analysis of individual participants' judgment policies told a very different story from the aggregated data, and suggested that there may be a substantial level of divergence between public judgments and sentencing policy/practice. All three PMFs tested, i.e., remorse, addressing addiction, and good character, are listed as mitigating factors in the assault guideline (Sentencing Council, 2011a). Additionally, Study 1 found that all three PMFs reduced the likelihood of an offender receiving a custodial sentence. However, the present study found that for each PMF the majority of people judged that it should not reduce sentence length. 48.4% of participants included addressing addiction in their judgment policies, 45.2% included remorse, and only 25.8% included good character. In addition, 65% of people had one or no PMFs in their judgment model, versus 52% for AFs. In other words, rather than everyone judging that all of the PMFs mattered somewhat (as the aggregated results suggest), people varied greatly in terms of which PMFs they considered important but tended to agree that only one or two of them should result in a reduced sentence.

The idiographic findings thus challenge Lovegrove's (2010, 2011) conclusion that personal mitigation may matter more to the public than to sentencers. The striking variation found among participants' judgments about PMFs is consistent with Hough et al.'s (2009) qualitative results regarding the different approaches taken to personal mitigation by different members of the public.

The overall correlation between participants' statistically derived judgment policies and self-reported judgment policies was moderate (.41), but correlations between the two policies varied widely across individual participants, all the way from 1 (a perfect positive correlation) through to -.73 (a large negative correlation). This suggests that there were substantial individual differences in people's ability to introspect on their own judgment strategies. In addition, people's statistical models included fewer PMFs and AFs on average than their self-reports. This supports equivalent findings in previous research (e.g., Dhimi & Ayton, 2001; Dhimi & Harries, 2001; Konečni & Ebbesen, 1982, 1984). Social desirability response bias (Paulhus, 1991; Podsakoff et al., 2003) could have caused participants to rate PMFs and AFs as important when they are not, in fact, part of their judgment policies.

Lastly, the cluster analysis identified sub-groups of participants who appeared to have similar views about the relative importance of PMFs and AFs for sentencing. One sub-group emphasised AFs and were relatively unaffected by AFs and PMFs overall. Participants who were more affected by the sentencing factors tended to have a balanced perspective, or give more weight to PMFs than AFs. Possible reasons for these clusters could be explored in future research.

5.5.1. Potential Implications

The present study has both theoretical and practical implications. From a theoretical perspective, the results of the present study show the benefits of using an idiographic methodology to study human judgment. The approach captures variation within a sample group and can reveal patterns in the data that could not be observed otherwise. For example, in the present study the aggregated results were broadly in line with sentencing policy, whereas the individual-level results revealed underlying disparity. The idiographic data also enabled a detailed visual representation of people's different judgment models, which is the

first of its kind in the judgment and decision making literature. Lastly, the cluster analysis added a new dimension by showing how people's individual judgment policies can be grouped based on the pattern of weights given to different variables without losing the richness of the underlying individual-level data.

The finding that people vary widely in their ability to report their own judgment strategies adds to the substantial body of evidence that simply asking people about their judgments is not an effective way to discover their judgment strategies (e.g., Newell & Shanks, 2014; Nisbett & Wilson, 1977). It also suggests that the ability to introspect on our own judgments may be mediated or moderated by one or more individual difference variables.

Turning to the practical implications, people in the present study mostly judged that only one or two of the PMFs tested should play a role in sentencing, and people differed greatly regarding which PMFs they believed should make a difference. All of the PMFs tested are listed in the England and Wales sentencing guideline for assault as factors that should be taken account of in sentencing (Sentencing Council, 2011a), and research suggests that they have an effect on sentence outcomes in practice (Jacobson & Hough, 2007; see also Study 1). In other words, most people in the present study disagreed with current sentencing policy and practice on personal mitigation to some extent. If policy-makers want to take proper account of public judgments about personal mitigation, the present findings suggest that sentencing policy should move away from giving substantial value to PMFs as a matter of course. However, it may be that the relative punitiveness found in this study – and that found in past studies of public attitudes to criminal justice (e.g., Dawes et al., 2011; Hough et al., 2013; Ipsos MORI, 2010) – is a product of the public's relationship with sentencing, which they experience through the prism of television, newspapers and social media. Cases are rarely reported in detail and tend to be chosen for media attention precisely because they

are atypical, making them a small, unrepresentative sample of sentencing outcomes (Green, 1996).

Research suggests that when the public are given an opportunity to improve their knowledge of sentencing, their attitudes tend to become less punitive (e.g., Chapman et al., 2002; Hough & Park, 2002; Salisbury, 2004). The Ministry of Justice recently had some success with the 'You be the Judge' website, an interactive website that aimed to show users how judges and magistrates decide sentences (Ministry of Justice, 2013). 'You be the Judge' was viewed by 74,000 people up to 31 December, 2012 and appeared to change many people's overly punitive attitudes to sentencing. 41% of participants started with the opinion that sentencing is "too lenient" and 52% started with the opinion that sentencing is "about right". After viewing the website, 72% stated that sentencing was "about right" and only 14% stated that sentencing is "too lenient". A similar online education programme could perhaps be used to help people understand how and why PMFs are applied in practice. This, in turn, might close the gap between public judgments about PMFs and current sentencing practice.

The discrepancies found between sentencers' and the public's judgments about PMFs also emphasise the importance of having guidance on the use of PMFs in sentencing that is based on empirical evidence both of current sentencing practice and public opinion on sentencing. Guidance can not only increase consistency in sentencing, but also enhance the transparency of the process, giving the public a better understanding of when and how PMFs influence sentencing. A more transparent process should promote procedural justice (i.e., the sense that a decision is the product of an acceptable decision-making procedure), which has been found to be an important determinant of satisfaction with the criminal justice system (e.g., Casper et al., 1988; Hough et al., 2013; Jackson et al., 2012; Rottman, 2005; Sunshine & Tyler, 2003; Tyler et al., 1997; Tyler & Huo, 2002).

5.5.2. Proposals for Future Research

On a theoretical level, it would be useful to explore possible individual differences that may mediate or moderate people's ability to report their own judgment policies accurately. A potential variable of interest is cognitive reflection (Baron, Scott, Fincher & Metz, 2015; Frederick, 2005; Toplak, Stanovich & West, 2011), which has previously been implicated in research dealing with people's ability to override unconscious intuitive judgments.

This study used regression analysis to estimate participants' judgment policies. As discussed above, while this is a recognised approach both in sentencing research and judgment and decision making research based on social judgment theory, it does have limitations (discussed in Chapter 1, pp. 36-37). Future research could explore promising alternatives to linear regression models for estimating people's judgment policies about sentencing, including fast and frugal heuristics (e.g., Dhimi & Ayton, 2001; von Helversen & Rieskamp, 2009) or coherence-based networks (e.g., Glöckner & Betsch, 2008; Glöckner et al., 2014).

Another interesting avenue of research would be to use a similar design to investigate public judgments about the role of PMFs in other offence types, such as sexual offences. Sentencing policy already highlights certain PMFs as being particularly relevant or irrelevant to certain offences. For example, the new guideline for sexual offences states in relation to rape, that "in the context of this offence, previous good/character/exemplary conduct should not normally be given any significant weight" (Sentencing Council, 2013c, p. 11). The guideline for causing death by driving highlights remorse as a PMF for this category of offence, stating that, "whilst it can be expected that anyone who has caused death by driving

would be expected to feel remorse, this cannot undermine its importance for sentencing purposes” (Sentencing Guidelines Council, 2008, p. 6).

Lastly, in order to bridge the gap between current sentencing practice and public judgments about PMFs in sentencing, further research is needed to understand better how and why sentencers take account of PMFs in practice (an issue explored further in Study 2). If we want people to appreciate the role played by PMFs in sentencing, we need to be able to describe to them why a given PMF may matter more or less in a particular context, and how this might affect an offender’s final sentence. This information could then be used to inform education programmes aimed at explaining the role of PMFs to the public.

5.5.3. Strengths and Limitations

Like all research, this study had some limitations. The sample used cannot be said to be fully representative of the UK public as a whole. However, there was a relatively even gender split, and a good spread of family income and political affiliation. There was no ethnic diversity in the sample. In addition, the study used multiple linear regression, which is a correlational analytic technique and so strictly speaking it cannot confirm the presence of causal links between variables. Nevertheless, it does provide a good indication of the likely impact of PMFs on sentence lengths. Finally, some (e.g., Lovegrove, 2011) have questioned the external validity of using short hypothetical scenarios of the type used in the present study, given that real sentencing cases are so much richer and factually complex. This is always a downside of using a controlled, experimental approach, but in this case the brevity of the scenarios reflects the public’s interaction with sentencing practice, through media headlines and summaries.

Strengths of the present study include that it is the first to use an idiographic, quantitative methodology to investigate public judgments about PMFs in sentencing. The

results provide new empirical evidence about the weight given by the public to several important PMFs, and also give a striking picture of the range and variety of people's judgments about the importance of PMFs in sentencing (and their relationship to AFs). The results raise both theoretical and practical implications for future research and guidance on sentencing policy and practice.

6. Further Analyses and General Discussion

The primary aim of the present PhD research was to understand better the role of PMFs in criminal sentencing. There were three secondary aims, each of which focused on the character-based PMFs remorse, addressing addiction, and good character. The first secondary aim was to examine how sentencers use character-based PMFs in their sentencing judgments. The second was to explore public judgments about the role of character-based PMFs in sentencing. The third was to compare sentencers' use of character-based PMFs with public judgments about PMFs. Studies 1 and 2 were intended to fulfil the first aim, while Studies 3 and 4 were intended to fulfil the second aim. The third aim was addressed to some extent in Studies 3 and 4 but is considered more fully in this chapter.

Studies 1, 3 and 4 used exclusively quantitative methods. Study 1 involved a statistical analysis of sentencing data, while Studies 3 and 4 both used experimental designs to capture individuals' judgment strategies. Study 3 used a nomothetic approach, aggregating the judgments made by groups of participants, while Study 4 used an idiographic design, capturing and analysing participants' individual judgment strategies. Study 2 used a qualitative methodology (thematic analysis) in order to explore Study 1's quantitative findings and the questions Study 1 left unanswered, and to suggest directions for further research.

The following three sections discuss how the present research has fulfilled each of its three aims. The remaining part of the Discussion deals with methodological and practical implications and offers suggestions for future research.

6.1. Sentencers' Use of Character-based PMFs

Criminal sentencing is a challenging, important and highly consequential judgment task. Personal mitigation – the process whereby an offender's personal characteristics and/or circumstances can be used to reduce his or her sentence – is a recognised part of the sentencing process in most jurisdictions. In England and Wales, sentencing statistics and past research suggest that Personal Mitigating Factors (PMFs) can make a substantial difference to sentencing judgments, in particular by reducing the chance that an offender will go to prison (Hough et al., 2003; Millie et al., 2007; Sentencing Council, 2012, 2013a, 2014, 2015a). However, until now, the effect that individual PMFs have on sentencing outcomes has not been quantified. The first part of the PhD research examined the impact that PMFs have on sentencing judgments by focusing on three pivotal character-based PMFs: remorse, good character and addressing addiction.

Study 1 used a statistical analysis of archival sentencing data from the Crown Court Sentencing Survey (CCSS) to explore relationships between the three character-based PMFs and the likelihood of an offender receiving a custodial sentence. The study confirmed that the three character-based PMFs each have a mitigating effect on sentencing judgments for common violent and property offences, since all three PMFs were associated with a substantially smaller chance of an offender going to prison. Addressing addiction predicted a non-custodial sentence much more strongly than either remorse or good character, which had similar predictive weights for both assault and burglary. (Immediate custody was 3.88 times less likely in cases of assault that involved addressing addiction; for burglary, the figure was 4.93 times. Remorse predicted 1.88 and 1.63 times lower likelihoods of immediate custody in assault and burglary, respectively. Good character predicted a 1.69 times lower likelihood of immediate custody for both offences). Addressing addiction was also the strongest predictor (of all PMFs) for both assault and burglary, while remorse and good character were the

second- and third-weakest predictors for burglary and amongst the weakest predictors for assault (see Table 6.1). The extent to which the three character-based PMFs predicted a non-custodial sentence did not differ substantially between assault and burglary cases.

Table 6.1

Character-based PMFs' ranked by their power in predicting non-custodial sentences in assault and burglary cases

PMF	Assault	Burglary	Mean
	ranking (/11*)	ranking (/13*)	ranking
Addressing addiction	1	1	1
Good character	8	11	9.5
Remorse	7	12	9.5

*Total number of PMFs listed in the relevant guideline

Study 1 also found evidence of underweighting in cases where either remorse and addressing addiction or good character and addressing addiction occurred together. In other words, offenders in such cases did not receive full credit for each of the PMFs present (compared to offenders in cases where only one or other PMF was present).

Study 1 represented a number of firsts for sentencing research. It was the first quantitative research to study the PMFs good character and addressing addiction, and the first to compare the effects of the three character-based PMFs on sentencing outcomes. It was also the first study of sentencing judgments that tested for the effect of interactions between PMFs. Lastly, it was the first quantitative study on PMFs that controlled fully for the effect of all other PMFs and aggravating factors, compared different offence types, and aggregated data from multiple years.

Study 2 helped to explain and extend Study 1's quantitative findings in a number of ways. The study highlighted the importance of examining the way that judges say they use different types of evidence when evaluating PMFs, such as what indicates genuine remorse, how to deal with character references, and where to 'draw the line' with addressing addiction where previous attempts have failed. Study 2 also identified possible hypotheses (psychological and practical) that may explain the underweighting of multiple PMFs and the relative weight given to addressing addiction compared to remorse and good character.

The sentencers interviewed in Study 2 also disagreed on a number of issues including the use of evidence when assessing PMFs and even the meaning of the PMFs themselves (especially good character). Differences in perception or understanding between sentencers may well influence their judgment strategies and produce inconsistency in their sentences. Further quantitative research would be required to test this hypothesis.

Overall, Study 1's findings provided much-needed empirical evidence of current sentencing practice in relation to PMFs. Study 2 provided additional insight into those findings, suggested areas where further research may be necessary in order to understand why character-based PMFs have the impact they do, and opened the debate for guidance on the correct use of evidence for evaluating PMFs. In addition, the present research was the first to use a mixed methods approach to investigate the use of PMFs in sentencing judgments. Studies 1 and 2 together illustrate how quantitative and qualitative research can be used in tandem to generate a cycle of complementary research that can progressively improve our understanding of personal mitigation as a phenomenon.

6.2. Public Judgments about Character-based PMFs in Sentencing

The second part of the present PhD research aimed to examine public judgments about the role of PMFs in sentencing. It is generally recognised that public opinion is relevant

to sentencing, and so it matters whether public perceptions of PMFs are consistent with current sentencing practice. The present research aimed to quantify the impact that the character-based PMFs have on people's sentencing judgments, as well as exploring the scale of variation amongst people's judgments about PMFs.

Like Study 1, Studies 3 and 4 also broke new ground in sentencing research. To date, only one other experimental study (Hough et al., 2009) explored public judgments about PMFs in sentencing; it used different PMFs across different scenarios (precluding direct comparisons), and it did not test either good character or addressing addiction. Studies 3 and 4 directly compared the effect on public judgments of the three character-based PMFs. Study 4 was also the first use of an idiographic approach in the study of sentencing judgments.

Studies 3 and 4 were designed differently, in order to explore different aspects of the public's involvement with sentencing. First, in real sentencing cases, PMFs can occur individually or along with other PMFs and/or aggravating factors (AFs). Study 3 explored the former situation, while Study 4 explored the latter. Second, public judgments about sentencing can be measured in various ways. Study 3 gave people case summaries that included the sentence passed, and asked them to evaluate the fairness of that sentence (in terms of whether the sentence was too harsh, too lenient, or just right, on a 7-point Likert-type scale). This mirrors people's everyday exposure to sentencing, i.e., reading or hearing cases reported in the media. However, the concept of "fairness", while central to criminal justice, is a step away from making an actual sentencing judgment. Consequently, Study 4 adopted a more direct approach, asking participants to choose custodial sentence lengths (in years and months) for a range of different cases. Third, Study 3 investigated burglary, while Study 4 examined assault (since Study 1 covered both offence types).

Studies 3 and 4 were consistent in finding that public judgments were, on average, influenced by all three PMFs. However, the relative weight given to the PMFs differed between the two studies (see Table 6.2 below). Addressing addiction and remorse were both ranked one place higher in terms of influence in Study 3 than in Study 4. However, the difference in relative weight between Studies 3 and 4 was far greater for remorse than for good character (see Figures 6.2 and 6.3 below). Good character was weighted highest in Study 3 but lowest in Study 4. The difference in PMF weights between the studies could be partly explained by the different offence contexts in Studies 3 and 4 (i.e., burglary and assault, respectively). The difference between public judgments about burglary and assault contrasts with the finding for sentencers, whose judgments about the relative importance of the three PMFs remained broadly consistent across assault and burglary cases.

Table 6.2

Character-based PMFs ranked by the size of their effects in Study 3 (burglary) and Study 4 (assault).

PMF	Study 3 rank	Study 4 rank	Mean rank
Addressing addiction	2	1	1.5
Good character	1	3	2
Remorse	3	2	2.5

Study 3 and Study 4 both found that the effect of PMFs on people's sentencing judgments was influenced by the presence of other variables. Study 3 found that addressing addiction had more effect on participants' fairness judgments in cases involving a community

sentence, and good character had more effect on fairness judgments in cases involving a fine. The effect of remorse was not found to differ across sentence types³⁷. Study 4 found that for 42% of participants, the predictive weight of one or more PMFs differed depending on whether a second PMF (or aggravating factor) was also present in a case. The PMFs that interacted in this way varied widely between participants; the most common combinations were remorse and good character, and good character and under the influence.

Study 4's analysis of individual participants' judgment strategies revealed that people varied considerably in terms of which PMFs they judged important. Interestingly, 65% of participants in Study 4 had one or no PMFs in their statistically estimated judgment model (36% = 1, 29% = 0), and none of the three PMFs tested were included in the judgment model of more than 48% of participants. These findings are contrary to the current England and Wales sentencing guidelines, which require that all three character-based PMFs should be taken into account when sentencing offenders. Lastly, Studies 3 and 4 both found discrepancies between people's statistically estimated judgment strategies and their self-reported judgment strategies. This finding validated the use of an experimental methodology for these studies, rather than relying on self-report measures that are likely to be inaccurate.

In summary, Studies 3 and 4 found that the public's sentencing judgments were, on average, mitigated by all three PMFs. However, the studies also found possible differences in the impact of PMFs (in particular good character) on public sentencing judgments between burglary and assault offences, and substantial variation in the weight given to the three PMFs by individual members of the public.

³⁷ However, since the effect of remorse was small, there may not have been sufficient statistical power to detect an interaction between remorse and sentence type.

6.3. Comparison of Sentencers' and Public Judgments about PMFs

The present research was the first to compare sentencers' judgments about PMFs with those of the public. Comparisons of the *absolute* weights given to the PMFs across the three studies are difficult given the different designs and measures used. However, this does not prevent meaningful comparisons of the *relative* weights given to the three PMFs in each study. In order to compare the relative influence on sentencing judgments of the three character-based PMFs in Study 1 with those from Studies 3 and 4, the findings for each PMF from each study are presented together on one page, in Figures 6.1 to 6.3. The results of the three studies for addressing addiction were consistent: sentencers and the public (on average) both judged it to be an important PMF. In addition, Study 2 did not identify any major evidential difficulties in determining whether to take account of addressing addiction as a PMF. It may simply be a matter of determining that an offender is prepared to take treatment seriously, and that they have not already failed on too many previous occasions.

Studies 1 and 3 and the aggregated data from Study 4 all showed that both sentencers and the public treated remorse as a relatively weak PMF. Study 2 and feedback from the pre-test for Study 3 suggested that scepticism about the sincerity of remorse is an issue for both sentencers and the public, and this may have contributed to the finding that remorse had only a small mitigating effect. However, the extremely weak effect found for remorse in Study 3, relative to good character and addressing addiction, suggests that the public may be less influenced by remorse than sentencers. This conclusion is supported by the idiographic findings of Study 4 (discussed further below).

In general, public sentencing judgments support sentencers' use of good character as a PMF, although Studies 3 and 4 produced conflicting results regarding the weight that it should be given. The larger issue with good character is simply that both sentencers and the

public accept it as a PMF. Conversely, most leading sentencing researchers argue that good character should not be a PMF at all, since it amounts to intrusive “social accounting” or “moral policing” that should have no part in the sentencing system (Ashworth, 2010, 2015; Maslen & Roberts, 2013; Murphy, 2006). In addition, Study 2 suggests that there may be a great deal of division amongst sentencers about what good character means (in particular the relationship between positive good character and lack of previous convictions), as well as ambiguity about what sort of evidence is relevant and the impact that it should have. In the circumstances, sentencers’ current approach is likely to be inconsistent and may be prone to bias.

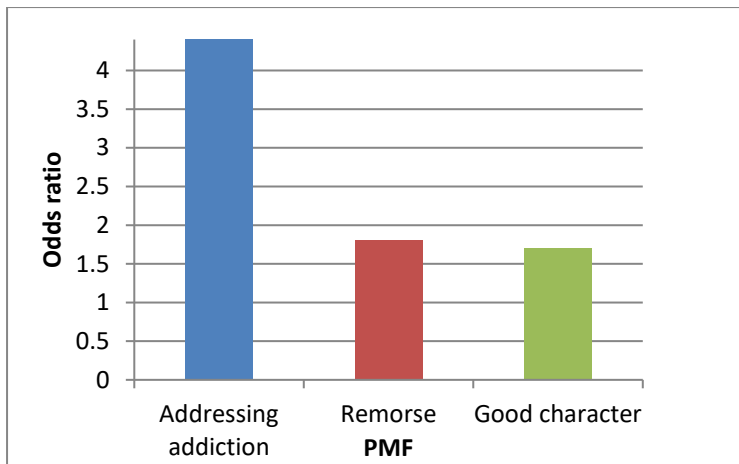


Figure 6.1. **Study 1** – Mean reduction in custodial sentence likelihood obtained from logistic regression models for Crown Court assault and burglary offences.

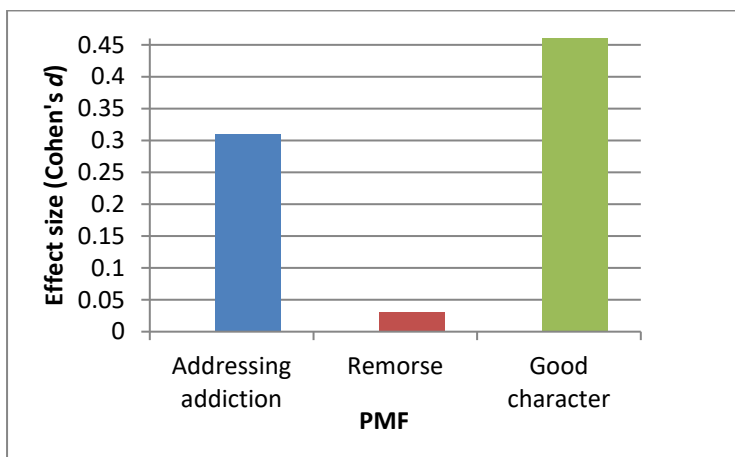


Figure 6.2. **Study 2** – Effect sizes of each PMF on fairness judgments.

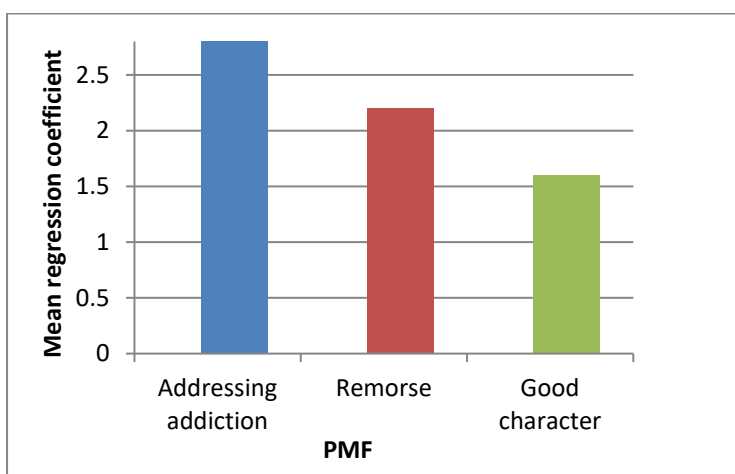


Figure 6.3. **Study 4** – Mean regression coefficients for the weight given to each PMF in participants' regression models.

While the findings of Studies 1 and 3 were broadly consistent with each other, Study 4's idiographic analysis of individual judgment policies told a different story. The majority (65%) of participants judged that none or only one of the PMFs tested should result in a reduced sentence – and there was considerable disagreement about which PMFs should matter. This suggests that a sizeable proportion of the public may not support the substantial role given to PMFs in current sentencing policy and practice. This disconnect between sentencers and the public in relation to personal mitigation is perhaps the most concerning issue arising from the comparison of data from sentencers and the public.

Both Study 1 (sentencers) and Study 4 (the public) found that PMFs were weighted less than aggravating factors (AFs)³⁸. Lastly, the present research found that underweighting of multiple PMFs (i.e., where two PMFs together provide less mitigation than the sum of the two individual PMFs) is a phenomenon which appears to affect both sentencers and the public. Study 1 found underweighting of two pairs of PMFs: remorse and addressing addiction, and good character and addressing addiction. Study 4 also found underweighting of multiple PMFs; in addition, people's judgment models varied widely in terms of the pairs of PMFs underweighted in this way. This finding conflicts with past research on public PMF judgments that found no significant interactions between factors (Hough et al., 2009 – although as discussed in Chapter 1, pp. 31-32, that study's design may not have enabled it to detect interactions).

6.4. Theoretical/Methodological Implications: How Psychology Can Inform Research on PMFs

The following section describes how psychology can help to advance research into the role played by PMFs in sentencing in two ways. First, psychological research offers various

³⁸ Study 4 found a very small effect for the AF “under the influence” but only because some participants treated it as an AF and some treated it as a PMF.

possible explanations for the findings contained in the present thesis. Second, methodologies developed by decision science (and psychology more generally) can help researchers to investigate the influence of PMFs on judgments made by sentencers and the general public.

6.4.1. Psychological Explanations for the Present Research Findings

The psychological research reviewed in Chapter 1 can help explain several of the findings reported in this thesis. First, underweighting of multiple co-occurring character-based PMFs was found in sentencing judgments made by both sentencers and the public (Studies 1 and 4). Two cognitive biases identified by heuristics and biases research programme (Gilovich, Griffin, & Kahneman, 2002; Kahneman, 2011; Kahneman, Slovic, & Tversky, 1982) may be at work here. As discussed in Study 1 (see Chapter 2, p. 124-125), sentencers' holistic approach to personal mitigation may have resulted in the subadditivity effect, meaning that two PMFs taken together were given less weight than the sum of their individual weights.

In addition, order effects could be involved. The “primacy effect” is the tendency to give disproportionate importance to the first item of information received, compared to subsequent items (Hogarth & Einhorn, 1992). Sentencers may be relatively strongly influenced by the first PMF mentioned by defence counsel, but less influenced by subsequent PMFs mentioned in the same case. If two PMFs such as remorse and good character that co-occur frequently were mentioned in a different order from one Crown Court case to another, the CCSS data overall would show reduced weight given to each factor when both factors were present (since each PMF would be a weaker predictor in cases where it was mentioned second). The possible impact of order effects on the weight given to PMFs in sentencing could be investigated experimentally.

Second, Studies 1 and 4 found that addressing addiction predicted a reduced sentence much more strongly than either remorse or good character. Researchers have argued that intuitive legal judgment involves sentencers building a coherent, holistic narrative of each offender's morality (see Ashworth, 2015; Fitzmaurice & Pease, 1986; Pennington & Hastie, 1986, 1992; Simon, Snow, & Read, 2004). Offenders judged to be basically good or honest are more likely to be given a chance and kept out of custody; their offences are viewed as one-off lapses rather than indicative of a bad character. It follows that if addressing addiction has a stronger mitigating effect than remorse or good character, this may be because offenders' efforts to address an addiction that is likely the root of their offending have a stronger impact on judgments about their moral character than expressions of remorse or past good deeds. Remorse and good character may also be undermined by other, conflicting narratives: for example, that manipulative offenders may shed crocodile tears to reduce their sentence – a perception that was observed in Studies 2 and 3 – or use their good name in the community to shield or even facilitate their offending – an issue that is flagged in the current England and Wales sexual offences guideline (Sentencing Council, 2013c).

Alternatively, the perceptual shorthand and focal concerns theories of sentencing (Albonetti, 1987; Steffensmeier, Ulmer, & Kramer, 1998) would suggest that addressing addiction may have a stronger influence on causal attributions of blameworthiness and likely recidivism or rehabilitation than the other two PMFs. Sentencers might judge that addicts need help more than punishment; viz. the “therapeutic jurisprudence” theme identified in Study 2. In addition, sentencers may attribute addicts' criminal behaviour to their addiction and conclude that if they are now dealing with that addiction, they are already in the process of rehabilitation, are less likely to reoffend in future, and so need not be imprisoned for the purposes of public protection or deterrence.

Third, Studies 1 and 4 found that AFs carry more weight than PMFs with both sentencers and the public, and (for most offences) when both AFs and PMFs are present together, AFs dominate. Another cognitive bias, “negativity bias” can help to explain this finding. Negativity bias predicts that negative information will have a stronger effect on judgment than positive information (Rozin & Royzman, 2001). Rozin and Royzman’s review of the psychological literature found extensive evidence that combinations of negative and positive items yield evaluations that are more negative than an unbiased algebraic sum of the items would predict. In other words, sentencers may prioritise AFs over PMFs because of AFs’ inherent negativity, rather than because they necessarily have characteristics that justify greater weight being given to them.

Fourth, Studies 1, 3 and 4 provide evidence that good character is currently a well-recognised PMF which can have a substantial effect on sentencing outcomes (and public judgments about those outcomes). Sentencing researchers have repeatedly argued from first principles that good character is an illegitimate moral/social accounting that undermines the principle of proportionality which lies at the heart of the England and Wales sentencing system (e.g., Ashworth, 2015; Maslen & Roberts, 2013; Murphy, 2006; Von Hirsch, 2011). Why, therefore, are both judges and the public substantially swayed by an offender’s previous good character? Again, the key may be the holistic, moralistic nature of intuitive judgment: good character will always have a role to play in discretionary sentencing since it shapes the way that sentencers conceptualise the offender, viewing their offending behaviour in light of their character and judging it differently for that reason.

6.4.2. Methodological Innovations from Psychological Research

Reducing inconsistency and bias in criminal sentencing requires an understanding of both descriptive knowledge about sentencing judgments and normative knowledge about how

the sentencing process ought to operate (see Chapter 1, p. 26). Almost all criminal justice research to date has been carried out by legal academics or criminologists, who may not necessarily have the methodological tools needed to study the judgment process effectively. Legal researchers tend to look at sentencing from a normative rather than descriptive perspective. For example, researchers weigh the arguments for and against contesting theories of punishment (e.g., just deserts theory versus more rehabilitative approaches) and consider how changes to sentencing law (e.g., the introduction of guidelines) have affected, or might affect, sentencing practice. Empirical research by legal researchers that is from a descriptive perspective is typically limited to assessing whether particular judgments are consistent with sentencing aims or legal principles. Research of this kind is based on analysing judges' stated reasons – which are more likely to be post-hoc rationalisations of the sentence given than veridical accounts of the actual judgment process (see Chapter 1, p. 31-32).

Criminologists' approach to sentencing tends to be descriptive rather than normative. However, the research methods used have often not been best suited to understanding the mechanics of judgment: surveys, observation, interviews, or analysis of archival sentencing data that do not contain sufficient variables to analyse the sentencing process in detail (i.e., few or no legal factors – unlike the CCSS data). Additionally, criminologists are, first and foremost, sociologists, who are interested in sentencing as a social process. This focus has naturally led researchers to concentrate on the role in sentencing of extra-legal, socially salient characteristics of offenders (and sentencers) such as race, gender and socio-economic status. While the social context of sentencing is undoubtedly important, arguably a more fundamental question is how sentencers actually use the legal factors (such as mitigating and aggravating factors) that, as a matter of law, should determine sentences. After all, it is no good eliminating e.g., racial bias if sentences are still not properly based on the relevant facts

of the case, or legal principles are applied differently from judge to judge or from court to court. It is also very likely that legal and extra-legal factors interact in meaningful ways. However, as previously noted at p. 38 of Chapter 1, research into sentencers' use of legal factors is currently lacking. It is true that some recent quantitative research has begun to focus on legal factors (Irwin-Rogers & Perry, 2015; Maslen, 2015a; Pina-Sanchez & Linacre, 2013; Roberts & Pina-Sanchez, 2014). However, more could be done to investigate the structure of sentencers' judgments, and this is where psychology can potentially add substantial value to sentencing research.

Judgment and decision making (JDM) is a specific sub-section of cognitive psychology which, as the name suggests, focuses on examining how individuals make judgments. JDM researchers typically use behavioural methods. These include using experimental methods to analyse the underlying mechanisms involved in judgment processes, such as how information is searched and integrated, and how features of the judgment task affect the decision strategies used (e.g., Gigerenzer, et al., 1999; Gigerenzer et al., 2011; Glöckner & Betsch, 2008a, 2008b; Glöckner et al., 2014).

The small sub-set of JDM researchers whose work is based on the principles of social judgment theory (e.g., Cooksey, 1996; Doherty & Kurtz, 1996; Hammond et al., 1975; see Chapter 1, pp. 34-37 for more detail) also use a person-by-person or idiographic approach. Idiographic designs capture and compare individual people's judgment strategies by asking them to make a series of judgments while systematically manipulating variables of interest. Idiographic studies' ability to measure inter-judge (and intra-judge) variation has proved particularly useful in applied domains such as criminal justice where individual judges may vary considerably in the judgment strategies they use (e.g., Dhimi & Ayton, 2001; Klaas et al., 2006; Konečni & Ebbesen, 1982, 1984; Sensibaugh & Allgeier, 1996).

JDM research typically adopts a descriptive approach, examining the strategies individuals use to carry out a particular judgment task. Descriptive data can then be compared to purported normative strategies for that task, and the two perspectives actively inform each other – the normative perspective can highlight potential problems in the descriptive account, while the descriptive perspective can challenge the accuracy or plausibility of the normative perspective. For this reason, JDM methodology is ideally suited to exploring the question of whether sentencing judgments are consistent with existing legal principles. In addition, the experimental methods used make it possible to identify cause-effect relationships between particular items of information and the judgments made.

Unfortunately, relatively few JDM researchers have investigated sentencing judgments (for exceptions see Dhimi et al., 2017; Englich et al., 2006; Konečni & Ebbesen, 1982, 1984; Mueller-Johnson & Dhimi, 2010; von Helversen & Rieskamp, 2009). This lack of research may be part of a wider reluctance to engage in applied JDM research, because of the complexity of the environments involved. In applied domains (including criminal justice), it is often difficult to isolate variables of interest and control for other variables that may affect the outcomes studied. For this reason, JDM research tends to be limited to lab-based studies of simplified, hypothetical judgment tasks, typically using student samples. The downside of relying on lab-based studies is lack of external validity; it is easy to argue that the findings may not apply to real-life judgment contexts. However, it is possible to design experimental studies so as to improve external validity and gain meaningful insights into judgments in applied domains such as sentencing (see Dhimi & Belton, 2017).

First, researchers can use idiographic designs to experimentally test judgment models that are more psychologically plausible than regression models, for example fast and frugal heuristics (e.g., Dhimi & Ayton, 2001; von Helversen & Rieskamp, 2009) or coherence-based models (Glöckner & Betsch, 2008a, 2008b; Glöckner et al., 2014). Idiographic designs

can also provide valuable information about the specific strategies used by individual sentencers, rather than aggregated data across a whole community, as well as exploring both inter- and intra-judge consistency in sentencing strategies.

Second, hypothetical judgment tasks can be designed to be more representative of the real world sentencing environment sentencers are used to dealing with, for example in terms of the distributions, inter-correlations and values of variables used (Brunswik, 1955, 1956; Dhimi et al., 2004; Hammond, Hamm, Grassia, & Pearson, 1987). Using an idiographic, representative approach is important because the judiciary and policy-makers are more likely to take notice of data showing the strategies used by individual sentencers in realistic sentencing tasks (Dhimi & Belton, 2017). While sentencers can be a difficult group to access, it might be possible to obtain participants for experimental studies through proactive engagement with institutions that have regular access to the judiciary, such as the Judicial College (the body responsible for training judges and magistrates in England and Wales).

Psychologists have also developed a rigorous approach to qualitative research (e.g., Silverman, 2011; Smith, 2008; Willig, 2013), as well as a small but growing expertise in mixed (quantitative and qualitative) methods research, an approach which can harness the complementary strengths and non-overlapping weaknesses of the two methods (e.g., Franz, Worrell, & Vögele, 2013; Tashakkori, Teddlie, & Sines, 2012; Yardley & Bishop, 2008). Past qualitative research into sentencing has tended to use far too informal an approach, without any (explicit) recognition of the methodological issues that have to be addressed when performing qualitative research, or the limitations on the types of conclusion that can validly be drawn from such work (e.g., Gelsthorpe & Loucks, 1997; Hough et al., 2003; Jacobson & Hough, 2007; Millie et al., 2003; Shapland, 1981 – see Chapter 3, pp. 136-138 for more detail). There has also been no attempt to date (with the exception of the present research) to produce a meaningful synthesis between qualitative and quantitative research.

Mixed methods research has substantial potential for enhancing quantitative research – as long as both elements are used appropriately (see the discussion in Chapter 3, p. 131-133).

This thesis has used various methodologies from psychological research to advance our understanding of the role of PMFs in sentencing. It was not possible to use an experimental design to explore sentencers' judgments and so a statistical analysis of archival sentencing data was used instead – but focused on PMFs, rather than the extra-legal factors more commonly explored in the literature. The statistical analysis was followed up with a qualitative study of sentencers' perceptions, aimed at generating possible explanations for the quantitative findings and identifying variables for future research. Public judgments about sentencing were explored using experimental methods, including (in Study 4) an idiographic approach derived from Social Judgment Theory.

6.5. Practical Implications of the Present Research

The findings of Studies 1 to 4 have various practical implications for both sentencers and sentencing policy-makers.

6.5.1. Why Should Personal Mitigation be Structured?

A wealth of past research shows that discretionary sentencing produces inconsistency and bias (see the review in Chapter 1, pp. 2-9). For some time, researchers have argued for the introduction of guidance and/or structure into the personal mitigation process (e.g., Dhami 2013a, 2013b; Roberts, 2008, 2011; Young & King, 2011). However, any move to reduce judicial discretion in relation to PMFs would have to overcome two common defences of discretionary sentencing. The first argument asserts that by constraining judicial discretion, judges are prevented from tailoring their sentences to the unique facts and circumstances of each individual offence and offender (Ashworth, 2015; Jacobson & Hough, 2007;

Krasnostein & Freiburg, 2013; Tata, 2010). “The point about judicial discretion is that a judge is trying to do justice in the individual case” (Lord Chief Justice Judge, quoted in House of Commons Justice Committee, 2009, para. 24). As Cooper puts it (2008, p. 279): “No case is ever identical to another... and each sentencing exercise is as particular to itself as the individual being dealt with”. In each of its annual reports of Crown Court sentencing data, the Sentencing Council stated that “[i]t is important to note that every criminal case is unique” (e.g., Sentencing Council, 2015a, p. 9).

As regards mitigating and aggravating factors, Von Hirsch (2011) notes that it is claimed they are so many and varied, and occur in such an infinite array of different contexts and combinations, that no useful guidance is possible (this viewpoint was also expressed by the judges in Study 2 – see Chapter 3, p. 161-162). The flaw in the “every case is unique” argument was neatly exposed by Hood (1962, p. 16): “Magistrates and judges... place particular value upon their experience in sentencing. Now, if this experience is to be of value, then all cases cannot be unique, they must be comparable at least in some respects; and even if it is agreed that all cases are unique in some sense, this [uniqueness] cannot be decisive in the practice of sentencing” (see also Von Hirsch, 2011³⁹).

Recent research based on large sentencing data sets from England and Wales and New South Wales, Australia appears to confirm that judges given wide discretion treat the vast majority of cases as directly comparable, and sentence them accordingly (Dhami, Belton, Merrall, McGrath, & Bird, 2017). The study found that across both jurisdictions, between 78% and 99% of offenders (depending on the sentence type) receive one of a limited set of preferred sentencing “doses” (between six and 25 doses depending on the court and jurisdiction). These sentencing doses reflect human preferences for cognitively calculable

³⁹ “The argument puzzles me. Were it valid, then how could even individual judges deal with such matters? After all, none of us (whether judges or academic penologists) seem to possess the skills of mathematicians and cosmologists in dealing with trans-finite quanta” (Von Hirsch, 2011, p. xv).

numerical values such as custodial or community sentence lengths of 90, 180 and 360 days, and fines in multiples of £50. Similar findings have been reported from sentencing data in the USA and Canada (Jones & Rankin, 2014; Ostrom & Ostrom, 2002; Wiseman, Fischer, & Connelly, 2006). A more structured process where particular levels and combinations of mitigating and aggravating factors would lead directly to a specified sentence would, in theory, produce a far wider range of sentence values. Dhami et al.'s (2017) findings therefore strongly suggest that truly individualised sentencing may be a myth, and so a structured approach could produce sentences that are more genuinely individualised than is the case in a system where judges have wide sentencing discretion.

The second argument often made in defence of judicial discretion is that sentencing is, and should remain, a fundamentally human process. Many sentencers argue that reducing judicial discretion “‘takes the humanity out of sentencing’ and encourages sentencers to act as ‘robots’ ” (Jacobson & Hough, 2007, p. 56). The non-discretionary, grid-based sentencing guidelines used in many US states have been condemned as dehumanising, impersonal sentencing machines (Aas, 2005; Tonry, 1996; Traynor & Potas, 2002). As summarised at pp. 29-30 of Chapter 1, research suggests that people consider fair treatment by the criminal justice system, including treating individuals with respect and dignity, at least as important as a fair outcome (Tyler, 2006a, 2006b). A survey of 80 English prisoners and criminal justice professionals (prison governors, probation officers, and police officers) found very little support for more automated sentencing systems or even more detailed guidelines (Dhami, 2006).

However, guidance on PMFs would not transform sentencing into an inhuman, disrespectful process. The sentencer would still have to decide whether each PMF should be taken account of in a given case (an unavoidably human, subjective task), and how influential it should be (relative to other instances of that PMF), then translate those judgments into a

final sentence. This would remain a challenging task. For example, the sexual offences guideline (Sentencing Council, 2013c) states that good character should be given progressively less weight in more serious cases, and where that good character has been used to facilitate the offence, it may be an aggravating factor. However, it remains up to the judge how to interpret that guidance in any specific case. It is hard to see how extending guidance of that kind to other PMFs would result in a process that was either inhuman or robotic.

In England and Wales there is now a fairly structured system of step-by-step sentencing guidelines. However, the process of personal mitigation is still almost entirely discretionary. The sentencing guidelines contain non-exhaustive lists of relevant AFs and PMFs but no guidance about how to use them⁴⁰. The two-step structure of the sentencing guidelines (described at pp. 21-24 of Chapter 1) limits the impact of personal mitigation somewhat, since Step One factors determine the sentence starting point and range, while Step Two factors can generally only move a sentence up or down within the range. Nevertheless, sentencers still have total flexibility within those limits.

As observed in Chapter 1, any structured approach to personal mitigation must incorporate both descriptive and normative perspectives, i.e., reflect current sentencing practice while remaining consistent with agreed sentencing principles. Study 1 has shown how current practice in relation to PMFs can be estimated using publicly available sentencing data. This work is a necessary starting point for the development of a structured approach to personal mitigation. However, describing current practice is only the beginning of that process. The present research has also identified a number of potential issues with current sentencing practice. Any structured approach to personal mitigation should aim to resolve these issues in one way or another. In practice, this would involve sentencers, policy-makers

⁴⁰ With certain very limited exceptions, such as the guidance about the relevance of good character in cases of serious sexual assault (Sentencing Council, 2013c).

and other stakeholders in the criminal justice system determining whether current practice should be codified in its existing form, or adjusted to make the process fairer. Should factor A be less important, or factor B more important? If so, on what grounds? Perhaps factor C should be completely rejected as a PMF. This debate can and should take account of relevant psychological theories/research that can help us to understand the issues found in the data.

The finding that both sentencers and the public underweighted multiple co-occurring character-based PMFs raises further questions such as where else underweighting of PMFs may occur (e.g., between which PMFs and in which offence types?) and why it occurs at all. The appropriate response to underweighting likely depends on what is causing it to begin with: cognitive bias (e.g., the subadditivity effect and/or order effects) or practical/legal constraints? If it is the former, then this clearly needs to be addressed, and probably can be through the structure proposed later in this chapter. If it is the latter, then this may not be a problem at all. Diminishing returns for multiple PMFs could be considered appropriate, at least in some circumstances. For example, judges in Study 2 commented that there has to be a cap on the overall impact that personal mitigation can have in any one case, regardless of the number of PMFs present in that case. Otherwise, there could be cases involving many PMFs where offenders would end up receiving no punishment at all (and/or their sentence would be outside the relevant guideline range). On the other hand, systematic underweighting of multiple PMFs could lead to the unnecessary imprisonment of many offenders whose cases lie on the cusp of custody. It may ultimately be a matter of principle to be decided by policy-makers and/or the judiciary. Either way, the phenomenon of underweighting should be explored further and dealt with appropriately.

The data from Study 1 on the relative weight currently given to the various PMFs listed in the sentencing guidelines should be reviewed by sentencers and policy-makers to determine whether the relative importance of those factors is appropriate or not. For example,

should addressing a drug or alcohol addiction have a much greater impact on whether an offender goes to prison than a genuine demonstration of remorse, or a substantial positive role in the community? Should remorse and good character have equal weight, or is one more important than the other, as a matter of principle and/or practice? Answering these kinds of questions is likely to require a debate about the relationship between personal mitigation and the purposes of sentencing, a topic which has for the most part been avoided to date (see, e.g. s142 of the Criminal Justice Act 2003, which simply lists five purposes of sentencing and gives no guidance about how they should be prioritised in practice). Also, if, as suggested by psychological theories of sentencing, the impact of addressing addiction (and other PMFs) is linked to reduced attributions of culpability/blameworthiness, then this may be an issue for the guidelines process, since culpability is supposed to be dealt with at Step 1. However, if the mitigation applied at Step 2 of the guidelines should not be based on judgments of reduced culpability, then what should it be based on instead? Mercy (e.g. old age)? Practical concerns (e.g. primary carers)? Or something else? This question ought to be explored further.

There is also the question of whether PMFs should be given differing weights depending on the type and seriousness of the offence involved. Study 1 found that PMFs are currently given very similar weights across burglary and assault offences but the situation may be different for other offence types. For example, the sexual offences guideline (Sentencing Council, 2013c) indicates that good character should be given less weight in more serious sexual offences (and can even be an aggravating factor where it is used to facilitate the offence). In addition, one judge in Study 2 suggested that PMFs may matter less for serious drug offences, since punishment in such cases is primarily about deterrence and so usually necessitates a prison sentence regardless of the offender's personal circumstances. This is an empirical question that could be explored using CCSS data.

The finding that AFs carry more weight than PMFs (with both sentencers and the public) raises issues of both principle and practice that would need to be resolved in any guideline or structured approach to personal mitigation. Past research also suggests that many combinations of AF and PMF are interrelated in complex ways, for example under the influence and addressing addiction (Padfield, 2011), and previous convictions and remorse (Maslen, 2015a). More research is needed into these kinds of AF/PMF relationship.

Studies 1, 3 and 4's evidence of good character as a PMF highlights the need for a resolution to the conflict between academia and sentencers about whether, as a matter of principle, good character should be a PMF or not. Either positive good character is a legitimate mitigating factor that entitles an offender to a degree of credit for their positive role in the community, and can help sentencers assess whether an offence is likely to have been a one-off (e.g., Sentencing Advisory Panel, 2010; Banks & Harris, 2012; Roberts et al., 2016), or it is illegitimate moral/social accounting which undermines the principle of proportionality that is at the heart of the England and Wales sentencing system (e.g., Ashworth, 2015; Maslen & Roberts, 2013, Murphy, 2006; Von Hirsch, 2011). This is an important debate that clearly needs to be resolved.

Finally, Study 2 suggests that the weight given to a PMF in any individual case may depend on sentencers' subjective evaluation of a range of different types of evidence (e.g., a guilty plea, reparation, behaviour in court, character references, and response to past rehabilitation efforts). That evaluation of PMF evidence is therefore of central importance to the operation of personal mitigation, and yet, to date, there has been very little empirical research on that part of the process. It is likely that sentencers' approach to evidence may be highly variable (Study 2 certainly suggests as much; see also Jacobson & Hough, 2007; Raynard et al., 1994). It follows that this element of the mitigation process might also benefit

from being structured, in order to promote a consistent approach to evidence use as well as the weight given to PMFs in different contexts.

6.5.2. How Could Personal Mitigation be Structured?

The conceptually simplest (but not necessarily the most useful) option for structuring sentencers' use of PMFs would be to produce narrative guidance of some kind. Guidance could take the form of notes added into each offence-specific guideline, such as the notes on good character already present in the sexual offences guideline (Sentencing Council, 2013c). Alternatively, a separate guideline on personal mitigation could be prepared, perhaps with example cases to illustrate key points (see e.g., Young & King, 2013).

A more ambitious approach would be to introduce more structure into the process sentencers use to determine the effect of PMFs (and AFs) on an offender's sentence. Adding structure to a process can also add complexity. One of the appeals of discretionary sentencing is that its largely intuitive nature means it can be accomplished quickly and with relatively little cognitive effort. There are already several steps in the England and Wales sentencing guidelines, and adding another step or sub-step for mitigation and aggravation could make the process overly cumbersome. One solution to problems of this kind would be to build a computer-based, on-screen sentencing support tool that would take sentencers through the guideline steps. A user-friendly tool of this kind could incorporate a more structured approach to mitigation and aggravation without substantially increasing sentencers' cognitive burden. Research in the medical field has found that easy-to-use computerised decision support can improve individuals' use of and compliance with guidelines (e.g., Goud et al., 2009; Goud, Jaspers, Hasman, & Peek, 2008). The following section describes two possible options for how such a tool might operate.

Structuring the personal mitigation process first requires a detailed analysis of the process itself. Figure 6.4 is a flowchart representing the judgment process that takes place in Step Two of the England and Wales sentencing guidelines (for a flowchart of the full sentencing process under the guidelines, see Dhimi, 2013a). In stages 1a and 1b of Figure 6.4, the sentencer evaluates any evidence presented in court in support of PMFs and/or AFs and then weights each factor's importance to the case in question. If the evidence for a PMF or AF is insufficient or unsatisfactory, that factor is ignored. In stage 2, the PMFs and/or AFs identified in stages 1a and 1b are integrated and the offender's sentence is adjusted down or up from the starting point determined by Step One of the guidelines (see Chapter 1, pp. 22-24).

The flowchart distinguishes between "case weight" (the importance given to each PMF or AF in the current case, relative to other cases involving that factor), and "factor weight" (the importance given to each PMF relative to other PMFs and/or AFs). Take, for example, an offender who is being sentenced for a serious sexual assault and has shown remorse. The case weight of remorse might be large because the offender confessed immediately at the police station and acknowledged his wrongdoing, and has apologised to the victim in writing. However, the factor weight of remorse might be relatively low for an offence of this type and this seriousness. As a result, the offender's remorse would be unlikely to have a major overall impact on his final sentence.

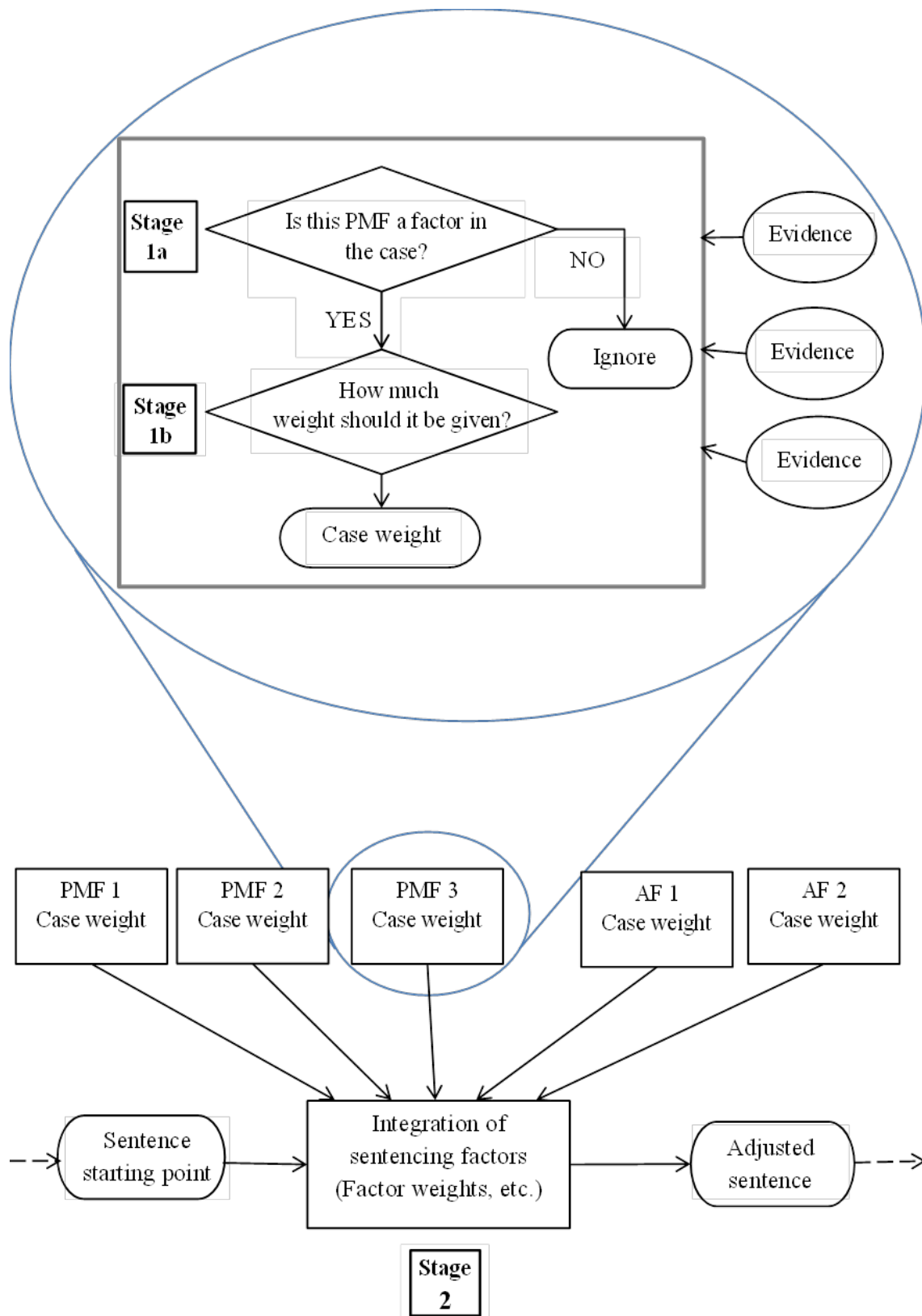


Figure 6.4. Flowchart representing the process for evaluating and integrating Personal Mitigating Factors (PMFs) and Aggravating Factors (AFs) at Step Two of the England and Wales sentencing guidelines. Key stages in the process are marked in bold.

6.5.2.1. Option 1 – Variable case weighting of PMFs. After determining the starting point and range for a given case, the sentencer would select the PMFs that he or she determined were present in that case (Stage 1a in Figure 6.4). These would be displayed on screen, alongside a set of slide bars (see Figure 6.5 below). The sentencer would allocate a case weight to each PMF using the slide bars, based on guidance about which evidence should be used to evaluate each PMF, and how it should be used (Stage 1b in Figure 6.4). The scales could be numbered in various ways – Figure 6.5 illustrates one option, with no numbers on the bars themselves but scores displayed to the right of the bars. The scale could be as rough or fine as desired (from, e.g., only three weight categories – “low”, “medium”, “high” – to the hundred-point scale illustrated below). In addition, certain PMFs could be numbered differently: for example, it might be judged more appropriate to make addressing addiction binary (since its presence makes a community sentence extremely likely).

Please score the weight to be given to each mitigating factor

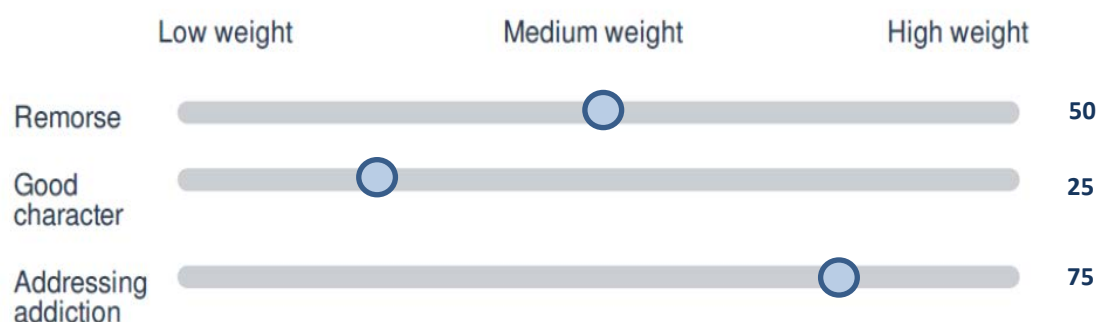


Figure 6.5. Slide bars indicating case weights to be given to particular PMFs, for use in a structured sentencing system.

Sentencers’ PMF case weights could then be integrated using a pre-determined algorithm, along with any AFs that may be present in the case, weighted in the same way (Stage 2 in Figure 6.4). The algorithm would be designed take account of PMF and AF factor

weights for each offence type. Factor weights would be based on empirical evidence of current practice such as that produced by Study 1, as well as relevant legal principles. For example, it could be decided that AFs, overall, should carry more weight than PMFs, and/or that certain PMFs should be especially relevant (or irrelevant) for the particular offence involved (e.g., very light weighting for good character in a case of historic sexual abuse). The integration process could also take account of interactions between factors, if desired: for example, if an offender has shown remorse but he has five previous convictions for the same offence, his remorse might have less impact as a result. The process described above would produce an adjusted sentence type and amount that could then be further amended to take account of Steps Three to Nine of the sentencing guidelines (guilty plea reduction, totality, etc.).

Option 1 would retain the flexibility to allow sentencers to decide, based on the evidence before them, the relative weight that each factor in a case should have, while ensuring that the factors were integrated in a consistent manner across every case. Sentencers' judgments about the weight to give to each PMF may, however, be inconsistent and biased. The variation in approach to PMFs found even in Study 2's small sample, and also in past research (Davies & Tyrer, 2003; Jacobson & Hough, 2007; Raynard, et al., 1994) shows how subjective judges' use of PMFs may be. Some form of guidance might be required on the use of evidence in evaluating PMFs (i.e., Stages 1a and 1b in Figure 6.4), in order to promote a consistent approach to determining PMF case weights.

Interestingly, China has recently introduced sentencing guidelines that use a comparable approach to that described in Option 1 (Roberts & Pei, 2016). The new guidelines use a step-by-step process and give starting sentence ranges for specific offences. Sentencers have discretion to adjust sentences within the range by defined numerical amounts, depending on the presence of specified mitigating and aggravating factors. For example, a

sentence can be reduced for “meritorious contributions to society” by up to 20% in an “ordinary” case, or by 20% to 50% in an “extraordinary” one. A confession is worth up to 50%, depending on the degree to which the offender expresses repentance. Unfortunately, it is too early to know what effect the new Chinese guidelines will have in practice.

6.5.2.2. Option 2 – Fixed case weighting of PMFs. Another option would be to remove discretion from the PMF weighting system (Stage 1b) completely. The sentencer would simply decide whether each PMF was relevant to the case (Stage 1a) and then move directly to Stage 2, where pre-determined factor weights would be applied to each PMF and integrated to produce an amended sentence. This would allow no room for subjectivity and therefore bias, other than when determining whether the factor was present or not. One disadvantage would be the lack of case weight flexibility. Every case involving, e.g., remorse would be treated the same. Further, any unintended biases in the system would then be applied uniformly across the whole jurisdiction.

In reality, however, even a fixed-weight PMF system such as Option 2 would not remove all discretion from the process, since sentencers would still have to decide whether each PMF should be taken account of in any given case. Study 2 suggests that determining whether to take account of a PMF is not a simple box-ticking exercise. It can involve consideration of various kinds of evidence and/or use of intuitive character judgment, in order to answer questions such as “is he genuinely remorseful?” or “is her character good enough that it should mitigate her sentence?” Arguably, all this system would do is move discretion from Stage 1b of Figure 6.4 to Stage 1a. In addition, it might lead sentencers to ignore weakly indicated PMFs (since flagging them as present would lead to a fixed, substantial impact on the sentence) or simply give credit for any PMF pleaded by defence counsel, rather than evaluate the evidence for it in any detail. If sentencers would, in effect, be weighting PMFs in either of the systems described above, it might be better to have them do so explicitly as part

of Stage 1b, rather than implicitly while making the yes/no decision required at Stage 1a. For the time being, at least, the process of assessing evidence is probably too complex and subjective (and too little understood) to be easily amenable to a fully structured approach.

6.5.3. Conclusions on Structured Personal Mitigation

Options 1 and 2 above are merely illustrative examples and pre-suppose many changes in the present sentencing process, not least the availability of reliable in-court technology to implement an on-screen system. The point is that – despite the judiciary’s views to the contrary – it would not be impossible to devise a structured system that could ensure greater consistency in the use of PMFs, while also incorporating relevant underlying legal principles and, if desired, retaining a substantial degree of discretion. Such a system could also be constructed in a relatively uncomplicated and user-friendly format.

A common argument against introducing any kind of quantitative, numerical structure into sentencing is that it amounts to imposing a kind of false precision on a process that is naturally subjective, ambiguous and uncertain – an art not a science (e.g., Jacobson & Hough, 2007; Mackenzie, 2006; Sentencing Council, 2015a; see also Study 2). In reality, however, no matter how factually complex and nuanced sentencing cases may be, numerical precision is an unavoidable part of the sentencing task. Sentencers must take all of the facts of the case and reduce them to a single number: a length of time in days, weeks or months, or an amount of money. In that respect, sentencing is very different from a lawyer writing a legal opinion or an intelligence analyst preparing a report, where recognition and expression of uncertainty is very much part of the output. Consequently, the idea of importing more numerical certainty into the sentencing process is actually not as radical as it seems. The existing system of using unstructured, imprecise intuitive judgment to reach a fixed numerical sentence is arguably more incongruous than having a more structured, numerical process would be.

In addition, judges in England and Wales already have to calculate both the guilty plea reduction and the enhancement for racial aggravation, both of which are proportional, numerical adjustments that must be applied separately from other factors (Ashworth, 2015; see e.g., the assault guideline – Sentencing Council, 2011a). Ashworth (2015) notes that judges seem to manage these calculations without any great difficulty. In addition, some of the judges interviewed in Study 2 appeared to think about personal mitigation in an arithmetical way (i.e., in terms of subtracting so-many months from a starting point for one PMF, and so-many for another). This suggests that a structured numerical approach might not be as far from the existing practice of some sentencers, at least, as is often argued.

Lastly, other areas of law are already very rule-based, and judges and legislators have not shied away from developing detailed rules, principles, tests etc., which can be extremely complex and are applied as consistently as possible to the facts of an individual case. Legal reasoning tends to be analytic rather than intuitive and, indeed, can sometimes produce a result that is somewhat counter-intuitive or surprising because it results from the strict application of a particular combination of rules and/or principles. Therefore, it is perhaps surprising that there is such resistance to rules in the context of sentencing practice. Why should the facts surrounding the criminal sentencing of a fraudster necessitate wide discretion, when the facts surrounding a parallel civil claim by those who suffered loss as a result would be dealt with in a much more structured, rule-based way?

6.5.4. Challenges to Introducing Structured Personal Mitigation

The work contained in this thesis has been presented at several decision-making, law-psychology and criminology conferences, and the present author has also collaborated on papers in various peer-reviewed journals relating to sentencing research (see Appendix 14). However, the present research is likely to have much more impact on the sentencing system if

it can obtain support from the people actually doing the sentencing, i.e., the judiciary.

Dhami's (2013b) survey of 89 Crown Court sentencers found some support for guidance on the weighting of AFs and PMFs (36% of participants). However, the Sentencing Council's consultation on the assault guidelines (Lock, 2015) found that for most of the 72 sentencers and 12 lawyers interviewed, adding more structure at Step 2 "would introduce too much complexity and remove judges' discretion to an unacceptable degree... you cannot sentence people by tick boxes" (Lock, 2015, p. 28). The seven judges interviewed in Study 2 were also, with one exception, resistant to the introduction of any guidance on the use of PMFs.

It can be argued that there has been too much resistance from the judiciary to guidance on the use of PMFs (and AFs) on principle, without considering the idea in any detail. It is easier to reject the idea out of hand based on sweeping statements about "tick boxes", unacceptable erosion of discretion and consequent loss of individualised sentencing, rather than engaging with the reality of what such guidance might look like and whether it could be made to work in practice. In fact, intuitive discretion and a completely rule-based analysis (such as the grid-based systems used in some US states) lie at either end of a continuum; there are many possible sentencing structures between the two ends – such as Options 1 and 2 above – that would involve a balanced "quasirational" mix of intuition and analysis (see Dhami, Belton & Goodman-Delahunty, 2015).

There could surely be little harm in trying to produce some guidance and seeing whether helpful consensus could be reached on any of the currently contentious issues, at least (e.g., remorse, good character, alcohol/drug intoxication, and employment status). As Ashworth puts it, "the effort should be made, in order to see whether a workable system can be devised" (Ashworth, 2010, p. 193). Guidance on PMFs might ultimately prove to be far less threatening and more useful than is currently imagined, much like the guidelines

themselves which many judges have admitted seemed like a bad idea at first but have shown themselves to be very useful in practice (Dhami, 2013b; see also Study 2).

For the reasons discussed above, it is particularly important to engage constructively with the judiciary about the results of research on personal mitigation. It would be very useful if judges could be encouraged to appreciate that structured sentencing need not amount to a “tick box” exercise. Part of the solution may be idiographic, representatively designed research into sentencers’ judgment strategies, which would be harder for sentencers to ignore as irrelevant to them personally. Individually-focused research of this kind might provoke a debate about ways in which additional structure could support sentencers, improving consistency and reducing bias without removing sentencers’ ultimate control of the process.

6.6. Implications of the Findings on Public Sentencing Judgments

Public opinion has a legitimate role to play in sentencing. In order to maintain public confidence and trust in the criminal justice system and reflect government’s democratic accountability to the people, there must be some level of correspondence between sentencing practice and public opinion (e.g., Bingham, 2000; Henham, 2012; Hough & Kirby, 2013; Roberts, 2008; Tyler, 2007). Past studies have found that the public are more punitive than judges about sentencing in general (Hough et al., 2013; Dawes et al., 2011; Ipsos MORI, 2010). However, research has not explored whether this finding extends to judgments about the place of personal mitigation in sentencing.

Study 3 found that people’s fairness judgments were relatively unaffected by remorse, while the majority of participants in Study 4 had one or no PMFs in the model that best predicted their judgments of sentence length. This relative lack of sensitivity to PMFs shows that past researchers’ findings of public punitiveness appear to extend to personal mitigation. This is perhaps not surprising, given that the public views sentencing through the filter of the

mass media. They are not exposed to a representative sample of cases (Green, 1996); only the controversial ones tend to be reported (typically those where an offender is perceived to have been punished too leniently). The public are also disengaged from the individual offenders involved; unlike sentencers, they do not meet offenders face-to-face, and have no opportunity to evaluate their personal circumstances and/or develop any empathy for their situation.

Recent research suggests that giving people more detailed information about the sentencing process can cause them to adopt less punitive attitudes (e.g., Chapman et al., 2002; Hough & Park, 2002; Hutton, 2005; Lovegrove, 2007, 2010, 2011; Ministry of Justice, 2013). It is therefore reasonable to hypothesise that public judgments about PMFs might be affected by giving them more exposure to the details of the sentencing process, in particular to offenders' unique personal circumstances. One possibility would be to build a website like the one used in the "You be the Judge" project (Ministry of Justice, 2013), which could take members of the public through the full facts of a sentencing case, including various PMFs, before asking them to choose an appropriate sentence. Building public awareness of PMFs might increase acceptance that they have a legitimate role to play in the sentencing process.

Another possible approach for bridging the gap between public attitudes to personal mitigation and current practice would be an education programme aimed at clarifying why the various PMFs listed in the sentencing guidelines are relevant to sentencing and can result in a reduced punishment. Finally, programmes that encourage engagement between past offenders and the community could help foster empathy and humanise offenders. Increased empathy could, in turn, improve people's ability to appreciate how offenders' personal circumstances or response to conviction may justify a more lenient sentence. One example of such a programme is Distant Voices, a collaborative song-writing project in Glasgow that involved offenders, prison staff, victims of crime, and members of the public (Arnal, 2016).

Lastly, structuring personal mitigation may improve public opinion in and of itself. This is because a structured process would increase transparency, which is a fundamental element in people's sense of procedural justice (Tyler, 2006a). Studies have shown that procedural justice is an important determinant of public satisfaction with the criminal justice system (e.g., Hough et al., 2013; Sunshine & Tyler, 2003; Tyler & Huo, 2002).

6.7. Proposals for Future Research

The present PhD research has identified many areas where future research is needed in order to understand more about sentencers' and the public's judgments concerning the role of PMFs in criminal sentencing. Some of the key issues to be explored are summarised below.

First, researchers should use experimental, idiographic methods and representative designs to examine individual sentencers' judgment strategies in relation to PMFs (see Dhimi & Belton, 2017). Amongst other things, idiographic research will highlight intra- and inter-judge variation in sentencing behaviour and would be more difficult for judges to dismiss as not relevant to them.

Second, CCSS data should be used to explore whether the relationship between PMFs and sentencing outcomes is different for offences perceived to be less receptive to personal mitigation, such as sex and drug offences, than for assault or burglary. It is important to build up a full picture of the role played by PMFs in sentencing. It is also important to identify any differences in the way that PMFs are applied across offence types, as these may either be legitimate or an issue to be resolved.

Third, future studies should investigate how PMFs influence sentencers' judgments of custodial sentence length, as well as the chance of a custodial sentence. This could be done with existing CCSS data but since that data set only contains sentence length categories rather

than actual sentence lengths, it would be better to obtain data including the actual sentence lengths (such as that used, e.g., by Pina-Sanchez & Linacre, 2013). This research would complete the picture of the weight given to PMFs in sentencing judgments, and help determine whether PMFs have a greater effect in cases that are on the borderline between custody and a community sentence, compared to cases where custody is virtually certain from the outset.

Fourth, researchers need to explore how sentencers search for and use evidence when determining whether a PMF is present in a particular case, and the weight it should be given. Ideally, this research should be done experimentally and idiographically (see 1 above). For example, which types of evidence are more or less influential when evaluating a PMF? Do the different types of evidence interact and, if so, how? Do sentencers make use of all the available evidence, or do they use simpler, heuristic strategies that rely on one or a few key evidence items?

Fifth, future research could test experimentally the four possible hypotheses suggested by Study 2 for the underweighting of multiple PMFs:

1. *psychological* –
 - a. sentencers' holistic view of personal mitigation leads to sub-additivity; and/or
 - b. the primacy effect means that the PMF mentioned first in a case carries more weight than the PMF mentioned second.
2. *structural* – sentencing guideline ranges constrain the amount that sentencers can reduce a sentence to reflect the PMFs involved in a case;
3. *motivational* – sentencers perceive that the final sentence should reflect the overall seriousness of a case, regardless of the PMFs involved; and

4. *socio-political* – the media create pressure on sentencers to avoid appearing too lenient, which causes them to underweight PMFs in cases where several are present.

Sixth, future studies should explore possible relationships between the three character-based PMFs and sentencers' (and the public's) causal attributions of blameworthiness and likelihood to reoffend or respond to rehabilitation. For example, does addressing addiction have a stronger effect on such attributions than the other two PMFs?

Finally, researchers should investigate whether increased public understanding of the role played by PMFs in the sentencing process might lead to increased support for PMFs. For example, if a website were designed to take people through the process of personal mitigation in a sample sentencing case, the PMFs included in the case could be varied between participants to test the effect of those PMFs on people's sentencing choices. The results could also be compared to people's judgment about the same case based only on a short case summary.

6.8. Concluding Remarks

Years of sentencing research strongly suggests that unfettered discretion in sentencing leads to inconsistency and bias. In response, many jurisdictions have moved towards more structured sentencing systems. In England and Wales, while sentencers' discretion has been curtailed by offence-specific guidelines that specify offence categories and sentencing ranges, the mechanism for personal mitigation remains almost entirely discretionary.

This thesis has illustrated how empirical data on sentencing practice in relation to PMFs could be used to create guidance or, ideally, a more structured system of personal mitigation. This thesis has argued that a structured system could achieve more consistent and transparent sentencing that is less prone to bias and no less individualised than that produced

by the current discretionary system. PMFs are not innumerable and indefinable. On the contrary, the key PMFs used by sentencers can and should be identified and properly defined, and agreement reached on the weight they should be given when determining the type and severity of sentence an offender receives.

This thesis has shown how methodological tools from psychology in general and decision-making research in particular can be used effectively to evaluate how sentencers use PMFs in real cases. The research in this thesis is the first to compare the effect of three important PMFs, namely remorse, good character, and addressing addiction, across two distinctly different offence types: assault and burglary. The present research is also the first to examine directly whether sentencers' use of PMFs is compatible with public opinion on those same PMFs. Another first is the use of quantitative and qualitative methods in combination to widen our understanding of the role played by PMFs in the sentencing process.

Criminal sentencers provide a hugely important public service. Their job is complex, intellectually demanding and must be both tiring and emotionally draining at times. Their contribution to the maintenance of a fair and just society is without question. Nevertheless, they should be prepared to embrace knowledge that can help them carry out their duties more effectively. This may mean accepting that suitable guidance on PMFs, and/or a more structured approach, could result in an improved sentencing system that may also reduce the prison population (if, for example, unwarranted underweighting of multiple PMFs could be avoided).

In addition, sentencers must be sufficiently responsive to public opinion to sustain people's trust in the criminal justice system. This thesis has identified some apparent gaps between public opinion and current practice in relation to PMFs, and has proposed a few

ways in which those gaps could perhaps be reduced. The key is likely to be improved public understanding of the legitimate role that personal mitigation can play in criminal sentencing.

Meanwhile, decision science researchers should embrace the possibilities of applied research and use their methodological expertise to advance empirical knowledge of sentencing in general and personal mitigation in particular. Sentencing researchers, for their part, need to find a way to engage more effectively with the sentencing community so that there is a better chance that their empirical findings can have a positive impact. Ultimately, it is worth remembering that sentencers, researchers and the public all share the same common goal: a fairer criminal justice system.

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Appendices

Appendix 1

Sentencing Council: Assault Definitive Guideline

[https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline -
_Crown Court.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf)

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Appendix 2

Sentencing Council: Burglary Offences Definitive Guideline

https://www.sentencingcouncil.org.uk/wp-content/uploads/Burglary_Definitive_Guideline_web_final.pdf

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Part B: To be completed by the sentencing Judge/Recorder for the PRINCIPAL OFFENCE ONLY

1. Type of offence FOR BREACHES, SEE NOTES OVERLEAF

2. Definitive guideline - Step 1

(a) Factors indicating greater harm

☐ Single offence

☐ Multiple offences - ANSWER FOR THE PRINCIPAL OFFENCE ONLY

☐ S.18 ☐ S.44 POA

☐ S.20 ☐ S.4 POA

☐ S.47 ☐ S.5 POA

☐ Common assault

☐ Harassment

Was this a S.29 offence? ☐ Yes ☐ No

Other offences

☐ Assault on a police constable ☐ Affray

☐ Assault: intent to resist arrest ☐ Violent Disorder

☐ Cruelty/neglect of a child

☐ Other (please specify in box below)

2. Sentence outcome (for the PRINCIPAL OFFENCE ONLY)

SEE NOTES OVERLEAF, TICK ALL THAT APPLY

(a) Custodial Sentence

☐ Determinate ☐ Length ☐ Extension Period

☐ Extended ☐ Custodial Term ☐ Extension Period

☐ Life ☐ Minimum Term

☐ Hospital Order

(b) Suspended Sentence Order or Community Order

☐ SSO ☐ Length ☐ Suspension Period

☐ Community Order ☐ Length

Requirements of Suspended Sentence Order or Community Order

TICK ALL ADULT REQUIREMENTS GIVEN ON NEAREST TWO EQUIVALENT

☐ Supervision ☐ Length

☐ Unpaid work ☐ Length

☐ Curfew ☐ Period

☐ Activity ☐ Time to Complete

☐ Prohibited activity ☐ Mental health treatment

☐ Exclusion ☐ Drug rehabilitation

☐ Residence ☐ Alcohol treatment

☐ Foreign travel prohibition ☐ Alcohol abstinence and monitoring (pilot scheme)

☐ Attendance centre

☐ Programme(s) (please specify in box below)

(c) Other outcome

☐ Fine ☐ Amount £

☐ Conditional discharge

☐ Absolute discharge

RECORD COMPENSATION, CONFISCATION & COSTS IN SECTION 7

3. Definitive guideline - Step 1

(a) Factors indicating greater harm

☐ Injury/fear of injury which is serious in context of the offence

☐ Victim particularly vulnerable

☐ Sustained or repeated assault on same person

(b) Factors indicating lesser harm

☐ Injury/fear of injury which is less serious in context of the offence

(c) Factors indicating higher culpability

Statutory aggravating factors

Offence motivated by/demonstrating hostility to:

☐ Race/religion ☐ Disability ☐ Sexual orientation

Other aggravating factors

☐ Significant degree of premeditation

☐ Threatened/actual use of weapon/equivalent

☐ Intention to cause more serious harm

☐ Deliberately causes more harm than necessary

☐ Targeting of vulnerable victim(s)

☐ Leading role in group or gang

☐ Offence motivated by/demonstrating hostility to age or sex

(d) Factors indicating lower culpability

☐ Subordinate role in group or gang

☐ Greater degree of provocation

☐ Lack of premeditation

☐ Mental disorder/learning disability where linked to the commission of the offence

☐ Excessive self defence

4. Offence seriousness - SEE NOTES OVERLEAF, INCLUDING GUIDANCE ON OFFENCES THAT FALL BETWEEN TWO CATEGORIES

☐ Category 1 ☐ Category 2 ☐ Category 3 ☐ No guideline

Most serious ☐ Least serious

5. Definitive guideline - Step 2

(a) Factors increasing seriousness

Statutory aggravating factors

Previous relevant convictions: ☐ 1-3 ☐ 4-9 ☐ 10+

Offences committed on bail

Other aggravating factors include

☐ Location

☐ Timing

☐ On-going effect on victim

☐ Offence against those in the public sector/service to public

☐ Presence of others

☐ Gratuitous degradation

☐ Victim compelled to leave home (domestic violence in particular)

☐ Failure to comply with current court orders

☐ On licence

☐ Attempt to conceal/dispose of evidence

☐ Failure to respond to warnings/concerns

☐ Offender was under the influence of alcohol/drugs

☐ Abuse of power/trust

☐ Exploiting contact arrangements

☐ Previous violence/threats

☐ Established evidence of community impact

☐ Steps taken to prevent reporting/assisting prosecution

☐ TICs

☐ Other factors (please specify in box below)

(b) Factors reducing seriousness or reflecting personal mitigation

☐ No previous relevant convictions

☐ Single blow

☐ Remorse

☐ Good character/exemplary conduct

☐ Determination/demonstration to address addiction/behaviour

☐ Serious medical conditions

☐ Isolated incident

☐ Age/lack of maturity affecting responsibility

☐ Lapse of time not fault of offender

☐ Mental disorder/learning disability where not linked to the commission of the offence

☐ Sole/primary carer for dependent relatives

☐ Other factors (please specify in box below)

6. Indication of guilty/guilty plea SEE NOTES OVERLEAF

Was guilt indicated at police station?

☐ Yes ☐ No ☐ Don't know

Was a guilty plea entered for the principal offence?

☐ Yes ☐ No

Where was guilty plea entered?

☐ At magistrates' court ☐ After PCMH/prior to day of trial

☐ At early guilty plea hearing ☐ At/after day of trial

☐ Prior to PCMH

☐ At PCMH

Was the guilty plea entered at the first reasonable opportunity?

☐ Yes ☐ No

Approximately what guilty plea discount was given? ☐ %

7. Additional factors

Were any of the following other factors present or stated to have influenced the sentence imposed?

DO NOT INCLUDE ANYTHING THAT IS COVERED ELSEWHERE ON THIS FORM

☐ Totality principle ☐ Compensation Order

☐ Consecutive sentence ☐ Confiscation Order

☐ Concurrent sentence ☐ Costs

☐ Multiple defendants ☐ Serving another sentence

☐ Ancillary Order

☐ Other factors that you stated and are relevant to the sentencing decision, for example S.116 Return to Custody (please specify in box below)

RELATIONSHIP OF FORM TO SENTENCING REMARKS

The form is designed to record the basis upon which the Judge/Recorder approached the task of passing sentence; fundamental to the principles of open justice, it is important that nothing is included on the form which is not reflected in the sentencing remarks. Judges may therefore find it helpful to complete the form and use it as a checklist when passing sentence. The majority of the information for Part A will be contained in or on the front of the case file.

- You should complete only **ONE** form for the **principal offence** in a sentenced case (including committal for sentence cases).
- If an offender is being sentenced for more than one offence, the principal offence will be the offence which attracts the **highest** sentence.
- If there is more than one offence attracting the highest sentence, the principal offence should be the one for which the highest maximum penalty exists.
- If the offences have the same maximum penalty you are asked to (randomly) select one as the principal offence.
- If there are **multiple offenders** in a case a form must be completed for the principal offence for **each offender**.

Breaches: You do not need to complete a separate form for breach proceedings unless the breach attracts a sentence in its own right e.g. breach of Protective Order or ASBO. In which case use the 'Other Offences' form (light brown).

OFFENCE FORMS AVAILABLE

Arson & Criminal Damage (violet)	Offences Causing Death (red)
Assault & Public Order (blue)	Robbery & Assault with Intent to Rob (orange)
Burglary (green)	Sexual Offences (turquoise)
Driving Offences (dark brown)	Theft, Dishonesty, Fraud (purple)
Drug Offences (maroon)	Other Offences (light brown)

ASSAULT & PUBLIC ORDER

GUIDANCE ON COMPLETION

Section 1: Type of offence

Tick the relevant box to reflect the **principal offence** for which the offender is being sentenced. If the principal offence is not listed please tick 'Other' and specify the offence, but please confirm that there is not another offence form that would be more appropriate.

Section 2: Sentence outcome

Tick the relevant box to reflect the sentence/s imposed. In all cases where a length, term, extension period etc. is given, please ensure that the measurement is also included e.g. hours, days, weeks, years. If a programme requirement was given, please specify what the specific accredited programmes were. If you impose a curfew, specify the length of the curfew only, do not provide the time of

day for which the curfew is in force. If you have imposed an Ancillary Order, Compensation or Confiscation Order this should be recorded under Section 7 'Additional factors'. Please record the actual sentence imposed without taking into account the period credited for remand time.

Section 3: Guideline Step 1 - Factors indicating greater or lesser harm and higher or lower culpability

Tick all the relevant factors for step 1 that you stated you took into account on reaching the sentence imposed.

Section 4: Offence seriousness

Tick the box relating to the category of offence seriousness that you stated in your sentencing remarks – wherever possible tick only one box, unless the seriousness level of the offence is so unclear, in which case tick two adjacent levels. If the offence is not yet covered by a sentencing guideline then tick the box 'No existing guideline'.

Section 5: Guideline Step 2 - Factors increasing and reducing seriousness or reflecting personal mitigation

Tick all the relevant factors for step 2 that you stated you took into account on reaching the sentence imposed. Any additional factors (not listed) should be inserted under 'Other factors' and specified. 'Previous convictions' is now a guideline step 2 factor. If you tick this box please also indicate the number of previous convictions you took into account. Tick the box for '1-3' for 'few', '4-9' for 'many' and '10+' for 'substantial'.

Section 6: Indication of guilt/guilty plea

Tick the relevant box to reflect whether there was an indication of guilt at the police station and if a guilty plea was entered for the principal offence. If a guilty plea was entered, tick the relevant box to indicate; at which proceedings it was entered and whether it was entered at the first reasonable opportunity. Write the percentage reduction that was in mind for the guilty plea only, and ignore any other discounts applied. If a guilty plea was not entered, only answer the first two questions in this section.

Section 7: Additional factors

A number of other factors may have been present in the case or have influenced the final sentence imposed, if so tick all of the boxes that apply to those stated in your sentencing remarks. You should use this section to record compensation and confiscation orders and any costs imposed. Any additional factors (which have not been specified or could not be included elsewhere on the form) that you stated and which you think were relevant should be inserted under 'Other factors'. This may include, among others, S.116 Return to Custody.

If you have any queries when completing this form or on the Crown Court Sentencing Survey in general, you can contact the Office of the Sentencing Council at research@sentencingcouncil.gsi.gov.uk or 020 3334 0641.

Crown Court Sentencing Survey

OFFICIAL WHEN COMPLETE

Burglary Offences

[PRINCIPAL OFFENCE ONLY]

Form Details

Form ID

Issued

Please refer to guidance on completing this form overleaf
COMPLETE FOR THE PRINCIPAL OFFENCE ONLY

Part A: To be completed by the
sentencing Judge/Recorder or Court Clerk
PLEASE COMPLETE IN CAPITALS

Case Details

Sentence date

 / /

CREST case ID

Offender Details

Offender
name

Surname

Forename

Offender DOB

 / /

Offender gender

- ☐ Male
☐ Female

If you have any queries when completing this form or on
the Crown Court Sentencing Survey in general, you can
contact the Office of the Sentencing Council at
research@sentencingcouncil.gsi.gov.uk or 020 7071 5793

1. Type of offence FOR BREACHES, SEE NOTES OVERLEAF

- ☐ Single offence
☐ Multiple offences - ANSWER FOR THE PRINCIPAL OFFENCE ONLY
☐ Aggravated Burglary
☐ Domestic Burglary
☐ Non-domestic Burglary
☐ Other (please specify in box below)

--

2. Sentence outcome (for the PRINCIPAL OFFENCE ONLY)

SEE NOTES OVERLEAF, TICK ALL THAT APPLY

(a) Custodial Sentence

- ☐ Determinate
- | |
|--------|
| Length |
|--------|
- ☐ Extended
- | | |
|----------------|------------------|
| Custodial Term | Extension Period |
|----------------|------------------|
- ☐ Life
- ☐ Hospital Order

(b) Suspended Sentence Order or Community Order

- ☐ SSO
- | | |
|--------|-------------------|
| Length | Suspension Period |
|--------|-------------------|
- ☐ Community Order
- Requirements of Suspended Sentence Order or Community Order
 TICK ALL ADULT REQUIREMENTS GIVEN OR NEAREST TWO EQUIVALENT

- ☐ Supervision
- | |
|--------|
| Length |
|--------|
- ☐ Unpaid work
- | |
|--------|
| Length |
|--------|
- ☐ Curfew
- | |
|--------|
| Period |
|--------|
- ☐ Activity
- | |
|------------------|
| Time to Complete |
|------------------|

- ☐ Prohibited activity
- ☐ Exclusion
- ☐ Residence
- ☐ Foreign travel prohibition
- ☐ Attendance centre
- ☐ Programme(s) (please specify in box below)

(c) Other outcome

- ☐ Fine
- | |
|----------|
| Amount £ |
|----------|
- ☐ Conditional discharge
- ☐ Absolute discharge

RECORD COMPENSATION, CONFISCATION & COSTS IN SECTION 7

3. Definitive guideline - Step 1

- (a) Factors indicating greater harm**
- ☐ Theft/damage to property causing significant degree of loss
- ☐ Soling/ransacking/vandalism of property
- ☐ Victim on/returns to premises while offender present
- ☐ Significant physical/psychological injury or trauma
- ☐ Violence used/ threatened particularly involving a weapon
- ☐ Context of general public disorder

(b) Factors indicating lesser harm

- ☐ No physical/psychological injury or trauma
- ☐ No violence used/threatened and a weapon not produced
- ☐ Nothing stolen or of very low value
- ☐ Limited damage/disturbance to property

(c) Factors indicating higher culpability

- ☐ Deliberately targeted
- ☐ Significant degree of planning
- ☐ Equipped for burglary
- ☐ Weapon present on entry or carried
- ☐ Member of group or gang

(d) Factors indicating lower culpability

- ☐ Offender exploited by others
- ☐ Offence committed on impulse/limited intrusion
- ☐ Mental disorder/learning disability where linked to the commission of the offence

4. Offence seriousness - SEE NOTES OVERLEAF, INCLUDING GUIDANCE ON OFFENCES THAT FALL INTO TWO CATEGORIES

- ☐ Category 1 Most serious
- ☐ Category 2
- ☐ Category 3 Least serious
- ☐ No guideline

5. Definitive guideline - Step 2**(a) Factors increasing seriousness**

- Statutory aggravating factors**
- ☐ Previous relevant convictions: ☐ 1-3 ☐ 4-9 ☐ 10+
- ☐ Offence committed on bail
- Other aggravating factors include**
- ☐ Child at home/returns
- ☐ Committed at night
- ☐ Abuse of power/trust
- ☐ Gratuitous degradation
- ☐ Steps taken to prevent reporting/assisting prosecution
- ☐ Victim compelled to leave home (domestic violence in particular)
- ☐ Established evidence of community impact
- ☐ Offender was under the influence of alcohol/drugs
- ☐ Failure to comply with current court orders
- ☐ On licence
- ☐ TICs
- ☐ Other factors (please specify in box below)

(b) Factors reducing seriousness or reflecting personal mitigation

- ☐ Subordinate role in group or gang
- ☐ Injuries caused recklessly
- ☐ Nothing stolen or of very low value
- ☐ Made voluntary reparation
- ☐ No previous relevant convictions
- ☐ Remorse
- ☐ Good character/exemplary conduct
- ☐ Determination/demonstration to address addiction/behaviour
- ☐ Serious medical conditions
- ☐ Age/lack of maturity affecting responsibility
- ☐ Lapse of time not fault of offender
- ☐ Mental disorder/learning disability where not linked to the commission of the offence
- ☐ Sole/primary carer for dependent relatives
- ☐ Other factors (please specify in box below)

- 7. Additional factors**
- Were any of the following other factors present or stated to have influenced the sentence imposed?
- DO NOT INCLUDE ANYTHING THAT IS COVERED ELSEWHERE ON THIS FORM
- ☐ Totality principle
- ☐ Compensation Order
- ☐ Consecutive sentence
- ☐ Costs
- ☐ Multiple defendants
- ☐ Ancillary Order
- ☐ Other factors that you stated and are relevant to the sentencing decision, for example §.116 Return to Custody (please specify in box below)

NOT FOR OFFICIAL USE

6. Indication of guilt/guilt plea SEE NOTES OVERLEAF

- Was guilt indicated at police station?
- ☐ Yes ☐ No ☐ Don't know
- Was a guilty plea entered for the principal offence?
- ☐ Yes ☐ No
- Where was guilty plea indicated in the court process?
- ☐ At magistrates' court ☐ At PCMH
- ☐ At preliminary hearing ☐ After PCMH/prior to day of trial
- ☐ Between preliminary hearing and PCMH ☐ At/after day of trial
- Was the guilty plea entered at the first reasonable opportunity?
- ☐ Yes ☐ No
- Approximately what reduction for guilty plea was given?
- SEE NOTES OVERLEAF
- | |
|---|
| % |
|---|

RELATIONSHIP OF FORM TO SENTENCING REMARKS

The form is designed to record the basis upon which the Judge/Recorder approached the task of passing sentence; fundamental to the principles of open justice, it is important that nothing is included on the form which is not reflected in the sentencing remarks. Judges may therefore find it helpful to complete the form and use it as a checklist when passing sentence. The majority of the information for Part A will be contained in or on the front of the case file.

- You should complete only **ONE** form for the **principal offence** where more than one offence appears on a single indictment in a sentenced case (including committal for sentence cases). However, if on a single sentencing occasion you have more than one indictment for unrelated cases, complete a form for the principal offence on each indictment.
- If an offender is being sentenced for more than one offence, the principal offence will be the offence which attracts the **highest** sentence.
- If there is more than one offence attracting the highest sentence, the principal offence should be the one for which the highest maximum penalty exists.
- If the offences have the same maximum penalty you are asked to (randomly) select one as the principal offence.
- If there are **multiple offenders** in a case a form must be completed for the principal offence for **each offender**.

Breaches: You do not need to complete a separate form for each breach proceedings unless the breach attracts a sentence in its own right, e.g. breach of Protective Order or ASBO. In which case use the 'Other Offences' form (light brown).

OFFENCE FORMS AVAILABLE

Arson & Criminal Damage (violet)	Robbery & Assault with Intent to Rob (orange)
Assault & Public Order (blue)	Sexual Offences (turquoise)
Burglary (green)	Indecent Photographs of Children (light turquoise)
Driving Offences (dark brown)	Theft, Dishonesty, Fraud (purple)
Drug Offences (maroon)	Other Offences (light brown)
Offences Causing Death (red)	

BURGLARY OFFENCES

GUIDANCE ON COMPLETION

Section 1: Type of offence

Tick the relevant box to reflect the **principal offence** for which the offender is being sentenced. If the principal offence is not listed please tick 'Other' and specify the offence, but please confirm that there is not another offence form that would be more appropriate.

Section 2: Sentence outcome

Tick the relevant box to reflect the sentence/s imposed. In all cases where a length, term, extension period etc. is given, please ensure that the measurement is also included e.g. hours, days, weeks, years. If a programme requirement was given, please specify what the specific accredited programmes were. If you impose a curfew,

specify the length of the curfew only, do not provide the time of day for which the curfew is in force. If you have imposed an Ancillary Order, Compensation or Confiscation Order this should be recorded under Section 7 'Additional factors'. Please record the actual sentence imposed without taking into account the period credited for remand time.

Section 3: Guideline Step 1 - Factors indicating greater or lesser harm and higher or lower culpability

Tick all the relevant factors for step 1 that you stated you took into account on reaching the sentence imposed.

Section 4: Offence seriousness

Tick the box relating to the category of offence seriousness that you stated in your sentencing remarks – wherever possible tick only one box, unless the seriousness level of the offence is so unclear, in which case tick two adjacent levels. If the offence is not yet covered by a sentencing guideline then tick the box 'No existing guideline'.

Section 5: Guideline Step 2 - Factors increasing and reducing seriousness or reflecting personal mitigation

Tick all the relevant factors for step 2 that you stated you took into account on reaching the sentence imposed. Any additional factors (not listed) should be inserted under 'Other factors' and specified. 'Previous convictions' is now a guideline step 2 factor. If you tick this box please also indicate the number of previous convictions you took into account. Tick the box '1-3' for 'few', '4-9' for 'many' and '10+' for 'substantial'.

Section 6: Indication of guilt/guilty plea

Tick the relevant box to reflect whether there was an indication of guilt at the police station and if a guilty plea was entered for the principal offence. If a guilty plea was entered, tick the relevant box to indicate; at which proceedings it was entered and whether it was entered at the first reasonable opportunity. Write the percentage reduction that was in mind for the guilty plea only, and ignore any other discounts applied. Where a percentage reduction is not appropriate given the nature of the sentence/s imposed, please write in 'Full credit' or 'Not applicable'. If a guilty plea was not entered, only answer the first two questions in this section.

Section 7: Additional factors

A number of other factors may have been present in the case or have influenced the final sentence imposed, if so tick all of the boxes that apply to those stated in your sentencing remarks. You should use this section to record compensation and confiscation orders and any costs imposed. Any additional factors (which have not been specified or could not be included elsewhere on the form) that you stated and which you think were relevant should be inserted under 'Other factors'. This may include, among others, S.116 Return to Custody.

If you have any queries when completing this form or on the Crown Court Sentencing Survey in general, you can contact the Office of the Sentencing Council at research@sentencingcouncil.gsi.gov.uk or 020 7071 5793.

Appendix 4

Further Details on Structure and Contents of Crown Court Sentencing Survey Data Sets

The layout of the CCSS forms was completely redesigned in April 2012. The Sentencing Council states (in the Sentencing Council Record Level Datasets User Guide) that the post April 2012 CCSS dataset was incompatible with that produced previously. The pre-April 2012 data was therefore converted to “a format as consistent as possible with that delivered by the new processors”. However, from April 2012 onwards there is a “significant structural break in the data... and users should be aware that there are some inconsistencies with the data delivered before then”. In summary:

- A new assault guideline was introduced in June 2011, so there are two files for assault in the 2011 database, “old” and “new”. The old and new data differ significantly in format.
- In April 2012 the design of the CCSS forms were changed but the questions were not. However, the “quality of data” post-April 2012 is higher (although the Sentencing Council does not specify how it is higher quality).
- A new burglary guideline was introduced in January 2012, so there are two files for burglary in the 2012, Q1 database, “old” and “new”.
- A new guideline for drug offences was introduced in February 2012 but new forms were not issued until April. So, 2012 Q1 is “old” form data only, while 2012 Q2-4 is “new” form data only.
- Some changes to questions regarding a guilty plea took place in 2012-2013 (see the Annex for details).

- 2012 Q2-4 (and presumably thereafter) the proportion of records for which the question on no. of previous convictions taken into account was unanswered reduced drastically due to improved data processing.
- Sentencing options available changed in 2012 Q2-4 as a result of the Legal Aid Sentencing and Punishment of Offenders Act 2012, so this is presumably reflected in the 2012 Q2-4 onwards data (although the Sentencing Council does not specify what the changes were).
- Section 29 offence cases (racially/religiously motivated common assault) are not included in the 2011 or 2012 datasets but are included in the 2013 dataset.
- From 2012, 2nd quarter onwards, the question of whether guilt was indicated at the police station changed from “yes/no” to “yes, no, don’t know”.
- During 2012, recording of guilty plea discounts changed from a categorical to continuous measure. The 2013 data mostly have discounts recorded as numbers.

Appendix 5

Study 1: Percentage of Assault and Burglary Cases (Table 1A.1 and 1A.2) Receiving Immediate Custody by Sentencing Factor in Crown Court Sentencing Survey Data Sets

Table 1A.1 - Assault offences

Sentencing factor	Immediate custody %
Constant	
Aggravating factors	
Previous convictions	68.8
Location	62.1
Under the influence	62.3
Ongoing effect	71.3
Presence of others	63.4
Timing	64.4
Current court orders	81.2
Previous violence	77.6
Offence against public sector	58.2
Abuse of power	67.0
On bail	83.2
On licence	89.5
Gratuitous degradation	81.5
Victim forced to leave	73.9
Failure to respond to warnings	80.5
Attempt to conceal evidence	94.2
Steps taken to prevent reporting	84.0
Community impact	66.2
Exploiting contact	80.0
TICs	85.7
Mitigating factors	
Remorse	38.2
No previous convictions	32.4
Single blow	37.8
Isolated incident	26.3
Good character	24.8

Age and/or lack of maturity	44.6
Addressing addiction	27.6
Mental disorder	34.1
Sole or primary carer	24.3
Lapse of time	26.9
Serious medical conditions	25.8
Specific offence	
Common assault	34.6
s.47 (ABH)	45.4
s.20 (GBH)	56.1
s.18 (GBH with intent)	96.8
Seriousness	
Category 3	23.8
Category 2	49.2
Category 1	80.0

Table 1A.2 - Burglary offences

Sentencing factor	Immediate custody %
Constant	
Aggravating factors	
Previous convictions	81.2
At night	81.4
Under the influence	77.1
Current court orders	88.1
On licence	93.9
TICs	90.4
On bail	86.3
Child at home	88.8
Abuse of power/trust	71.0
Community impact	85.6
Victim compelled to leave	81.7
Gratuitous degradation	91.2
Steps taken to prevent reporting	93.8
Mitigating factors	
Remorse	58.1
Addressing addiction	44.0
Nothing stolen	51.2
No previous convictions	38.0
Age and/or lack of maturity	54.1
Subordinate role	44.7
Good character	34.5
Mental disorder	45.9
Sole or primary carer	41.1
Serious medical conditions	32.9
Lapse of time	43.7
Voluntary reparation	39.6
Injuries caused recklessly	54.5
Specific offence	
Non-domestic burglary	62.5

Domestic burglary	77.2
Seriousness	
Category 3	49.1
Category 2	71.2
Category 1	91.9

Appendix 6

Study 2: Question Script for Semi-structured Interviews

Introductory

1. *Introduce myself etc.*
2. How long have you been a judge? *Ask about their career to date, especially their experience of sentencing.*

General questions about the PMFs

My research is focused on three personal mitigating factors in particular: remorse, addressing drug or alcohol addiction, and good character.

3. What is your experience of these personal mitigating factors in practice?
4. What are the features you look for when deciding whether to take account of these factors in your judgments?
5. How do you approach cases where two (or more) of these factors are present together?
6. Do you approach personal mitigation differently depending on the type of offence involved – for example, violent crime versus property/financial crime?

Questions about my empirical findings

1. Why might addressing addiction have a larger mitigating impact on sentences than remorse or good character?
2. Why might addressing addiction have a larger impact in burglary cases than in assault cases?
3. Why might remorse and addressing addiction count for less when they are present together in a case than they do individually? *Same question for good character and addressing addiction in burglary.*
4. Why might (step 2) aggravating factors have a larger impact, overall, on sentences than (step 2) mitigating factors?

Questions about guidance

1. Do you think guidance on PMFs, based on current sentencing practice, could be a useful resource for sentencers (particularly in the magistrates' court)?
2. If so, what do you think it should look like? *[E.g., paragraph on each factor; arranged by offence category; example cases; just highlight particular factors that may be important or irrelevant for particular offences (as is already the case in the sexual assault guideline)?]*
3. Do you think public opinion is relevant to sentencing and, if so, in what way?

Appendix 7

Study 2: Further Details of Analysis Carried Out

The Six Questions of Thematic Analysis

The only detailed, step-by-step guide to thematic analysis currently available is Braun and Clarke's (2006) article. The analysis of the judges' interview transcripts therefore followed Braun and Clarke's principles closely, supplemented by input from other researchers where appropriate. Braun and Clarke (2006) identified six decisions that have to be made before carrying out thematic analysis. The authors noted that these decisions are often not made explicit but should be identified and discussed, and so in the present study, each one was dealt with in turn before starting the analysis.

1. What counts as a theme? There is no universally accepted standard for establishing the relevance of a pattern in thematic analysis (Braun, Gavey, & McPhillips, 2003; Trahan & Stewart, 2013; Meehan, Vermeer & Windsor, 2000). The author therefore used his own judgment to determine whether themes were present in the data, based on whether a concept captured something important to my research aims or provided a complement to the quantitative analysis (Trahan & Stewart, 2013), rather than relying on rigid numerical measurement of prevalence.

2. Rich description versus more detail of one aspect. The present analysis did not attempt to represent the entire data set comprehensively but was instead focused on providing a detailed account of the themes relating to the research aims and the results of the quantitative analysis in Study 1.

3. Inductive versus deductive analysis. The approach to coding and theme development in this study's thematic analysis was primarily deductive, since it was driven by

specific research aims rather than being an inductive, bottom-up approach based on the data themselves. However, some novel themes were also developed inductively from the data. Combining deductive and inductive analysis is an accepted practice in qualitative research (e.g., Fereday & Muir-Cochrane, 2006; Saldana, 2009).

4. Semantic or latent themes. The analysis was primarily focused on the interpretation of the explicit statements made by the judges interviewed, rather than the ideas, assumptions or conceptualisations that may have implicitly shaped the explicit content of the data.

5. Epistemology. As discussed above, the analysis adopted a critical realist epistemology, influenced to some extent by the principles of interpretational phenomenological analysis.

6. The many questions of qualitative research. It is acknowledged that the present study involved addressing a series of different questions, from a broad overall research question (How do sentencers perceive PMFs?), through the narrower, specific questions needed to address the specific research aims, to the individual questions asked as part of the interview process.

The Six Steps of Thematic Analysis

There were six major steps in the thematic analysis, following Braun and Clarke (2006). The analysis was a recursive/iterative, rather than linear, process, involving movement back and forth across and within the steps as needed. In particular, the data were returned to continually, using them to build on the analysis and checking in to make sure that the analysis remained faithful to the data throughout the process.

Step 1 – Familiarising. All of the transcripts were read and re-read in full before starting the coding process in order to ensure a good grasp of the material.

Step 2 – Generating initial codes. The data were coded using a preliminary set of codes based on the topics determined by the study’s research aims and the questions raised by Study 1 (e.g., codes for each of the PMFs). Other codes were inductively generated from reading the data. The goal with coding extracts from the data was to identify “the most basic segment... that can be assessed in a meaningful way” (Boyatzis, 1998, p. 63). Coloured pencils and a numbering system were used to mark coded sections of text, coding as inclusively as possible and also flagging accounts that departed from the dominant story. Contemporaneous analytic memos were written to clarify the researcher’s interpretation of emerging patterns (Charmaz, 2006; Gathings & Parrotta, 2013; Livingston, Crocker, Nicholls, & Seto, 2016). The data were also continually compared to one another in order to refine the analysis (Silverman, 2011). Lastly, the extracts for each code were collated into separate documents.

Step 3 – Searching for themes. For the most part, it was not necessary to collate the initial topic-based codes into higher-level themes since the key initial topics (such as remorse, good character and addressing addiction) were relatively broad. In fact, the process used was mainly the reverse: once the extracts were collated by topic, they were then sub-divided into relevant themes that had been identified during the process of coding and memo writing. However, in the case of the theme, “underweighting of multiple PMFs” a number of codes were collated to produce this higher-level theme. To inform the analysis further, a mind map or “thematic map” (Braun & Clarke, 2006) was generated for each topic and its themes. Account was also taken of what was not said in the interviews, and the implications that those gaps (what my interviewees chose not to say) may have for the interpretation of the themes (Marzano, Ciclitira, & Adler, 2016).

Step 4 – Reviewing themes. At this step, the extracts gathered for each theme were reviewed in order to determine whether the theme, and the overall topic represented by the original code, was adequately supported by the extracts or need to be amended or removed from the analysis. A final thematic map of the whole data set was not produced. This was because the analysis did not include all the themes identified in the data set, since the study's focus was on themes that responded to the research questions and/or provided insight into Study 1's quantitative findings.

Step 5 – Defining and naming topics and themes. The definition and content of each topic and related theme was refined, and a clear name for each theme generated that gave an immediate sense of the theme. Appendix 8 to this chapter sets out the final table of topics and themes that were derived from the data.

Step 6 – Producing the report. In order to report the analysis, extracts were selected to illustrate each theme. The goal was to choose extracts that vividly captured the essence of the theme. Overall, the aim of the report was to produce a concise, coherent account of the patterns found in the data, both within and across the themes identified.

Appendix 8

Study 2: Table of Final Topics and Themes

No.	Topic	Themes
1.	Remorse	Is it genuine? An apology is not enough Objective evidence is best Behaviour in court can matter, too
2.	Good character	Positive good character vs. no previous convictions The importance of character references Good character is not exemplary conduct Good character and “one-off” offences
3.	Addressing addiction	It deals with the cause of offending A cusp PMF – treatment requires a community sentence Therapeutic jurisprudence No second, third, fourth, etc. chances
4.	Underweighting of multiple PMFs	PMFs seen as two sides of the same coin Personal mitigation is assessed holistically Judges’ justifications for underweighting
5.	PMFs and borderline cases	PMFs matter most in borderline cases If there is a chance, take it
6.	PMFs and offence type/seriousness	Addiction linked to burglary PMFs matter less for long-term offences PMFs matter less in offences that are not about rehabilitation PMFs matter less in offences where custody is guaranteed
7.	Inconsistency of approach	Remorse Good character Addressing addiction Holistic approach not taken by all
8.	Reluctance to accept PMF guidance	It’s too difficult – every case is different Guidance is not needed It’s best dealt with by experience That’s what our training is for Support for guidance

Appendix 9

Stimuli used in Study 3

Instructions

Please read each case and then answer the questions underneath. *To answer, please choose the number that best reflects your opinion.*

AG went into the office at the back of a newsagent's shop while the owner was distracted and stole some money from an open cash box. AG was convicted of burglary. He is now participating in a drug/alcohol rehabilitation programme.

AG was fined 1½ times his weekly income.

How fair do you think this sentence is?

Too lenient *Just right* *Too harsh*

-3 -2 -1 0 1 2 3

How satisfied do you feel with this sentence?

Very unsatisfied *Very satisfied*

1 2 3 4 5 6 7

How morally good or bad is this offender?

Very bad *Average* *Very good*

-5 -4 -3 -2 -1 0 1 2 3 4 5

NP forced the side door of a local coffee shop and escaped with some cash and a mobile phone. He was later convicted of burglary. He wrote a sincere letter of apology to the shop owner.

NP received 12 weeks' imprisonment.

How fair do you think this sentence is?

Too lenient *Just right* *Too harsh*

-3 -2 -1 0 1 2 3

How satisfied do you feel with this sentence?

Very unsatisfied *Very satisfied*

1 2 3 4 5 6 7

How morally good or bad is this offender?

DR broke into a railway storage yard and stole a large roll of copper wire. He was subsequently convicted of burglary. He has volunteered for many years at a local homeless shelter.

DR was fined 1½ times his weekly income.

Too lenient *Just right* *Too harsh*

-3 -2 -1 0 1 2 3

Very unsatisfied

1 2 3 4 5 6 7

Very satisfied

Very bad *Average* *Very good*

-5 -4 -3 -2 -1 0 1 2 3 4 5

MT received a community order consisting of 80 hours of unpaid work.

Too lenient *Just right* *Too harsh*

-3 -2 -1 0 1 2 3

Very unsatisfied

1 2 3 4 5 6 7

Very satisfied

Very bad *Average* *Very good*

-5 -4 -3 -2 -1 0 1 2 3 4 5

JS bypassed a coded door lock at a hospital and stole a set of security radios and some pagers. He was convicted of burglary. He is now participating in a drug/alcohol rehabilitation programme.

JS received 12 weeks' imprisonment.

How fair do you think this sentence is?

Too lenient *Just right* *Too harsh*

-3 -2 -1 0 1 2 3

How satisfied do you feel with this sentence?

Very unsatisfied *Very satisfied*

1 2 3 4 5 6 7

How morally good or bad is this offender?

Very bad *Average* *Very good*

-5 -4 -3 -2 -1 0 1 2 3 4 5

EM committed a burglary by breaking into a corner shop and stealing some cash that the owner had left in the cash register overnight. He was subsequently convicted of burglary. He assisted the police by giving them evidence about other offenders.

EM received a community order consisting of 80 hours of unpaid work.

How fair do you think this sentence is?

Too lenient *Just right* *Too harsh*

-3 -2 -1 0 1 2 3

How satisfied do you feel with this sentence?

Very unsatisfied *Very satisfied*

1 2 3 4 5 6 7

How morally good or bad is this offender?

Very bad *Average* *Very good*

-5 -4 -3 -2 -1 0 1 2 3 4 5

KJ burgled a council community centre by climbing in through a window and stealing a flat-screen television. He was later convicted of burglary. He wrote a sincere letter of apology to the council.

KJ was fined 1½ times his weekly income.

How fair do you think this sentence is?

<i>Too lenient</i>		<i>Just right</i>		<i>Too harsh</i>		
-3	-2	-1	0	1	2	3

How satisfied do you feel with this sentence?

<i>Very unsatisfied</i>				<i>Very satisfied</i>		
1	2	3	4	5	6	7

How morally good or bad is this offender?

<i>Very bad</i>			<i>Average</i>				<i>Very good</i>			
-5	-4	-3	-2	-1	0	1	2	3	4	5

RT's wife worked at a local office building. RT borrowed her staff pass, entered the office after hours and removed two computer monitors. He was later convicted of burglary.

RT received a community order consisting of 80 hours of unpaid work.

How fair do you think this sentence is?

<i>Too lenient</i>		<i>Just right</i>		<i>Too harsh</i>		
-3	-2	-1	0	1	2	3

How satisfied do you feel with this sentence?

<i>Very unsatisfied</i>				<i>Very satisfied</i>		
1	2	3	4	5	6	7

How morally good or bad is this offender?

<i>Very bad</i>			<i>Average</i>				<i>Very good</i>			
-5	-4	-3	-2	-1	0	1	2	3	4	5

FO broke into an artist's studio. He gained entry by climbing in through a skylight and stole a camera and a printer. He was convicted of burglary.

FO received 12 weeks' imprisonment.

How fair do you think this sentence is?

<i>Too lenient</i>		<i>Just right</i>		<i>Too harsh</i>		
-3	-2	-1	0	1	2	3

How satisfied do you feel with this sentence?

<i>Very unsatisfied</i>				<i>Very satisfied</i>		
1	2	3	4	5	6	7

How morally good or bad is this offender?

<i>Very bad</i>			<i>Average</i>				<i>Very good</i>			
-5	-4	-3	-2	-1	0	1	2	3	4	5

NM gained entry to a pub by forcing the back door and stole some cash and a case of vodka from behind the bar. NM was convicted of burglary. He has volunteered for many years at a local homeless shelter.

NM received a community order consisting of 80 hours of unpaid work.

How fair do you think this sentence is?

<i>Too lenient</i>		<i>Just right</i>		<i>Too harsh</i>		
-3	-2	-1	0	1	2	3

How satisfied do you feel with this sentence?

<i>Very unsatisfied</i>				<i>Very satisfied</i>		
1	2	3	4	5	6	7

How morally good or bad is this offender?

<i>Very bad</i>			<i>Average</i>				<i>Very good</i>			
-5	-4	-3	-2	-1	0	1	2	3	4	5

CD gained access to an office building by claiming he had come to read the gas meter. While inside, he stole an i-pad and a mobile phone. H was later convicted of burglary. He assisted the police by giving them evidence about other offenders.

CD was fined 1½ times his weekly income.

How fair do you think this sentence is?

<i>Too lenient</i>		<i>Just right</i>			<i>Too harsh</i>	
-3	-2	-1	0	1	2	3

How satisfied do you feel with this sentence?

<i>Very unsatisfied</i>					<i>Very satisfied</i>	
1	2	3	4	5	6	7

How morally good or bad is this offender?

<i>Very bad</i>			<i>Average</i>				<i>Very good</i>			
-5	-4	-3	-2	-1	0	1	2	3	4	5

BU was walking down a back street after dark and noticed that the side window of an Italian restaurant was unlocked. He climbed in through the window and stole the restaurant's cash register. BU was convicted of burglary. He assisted the police by giving them evidence about other offenders.

BU received 12 weeks' imprisonment.

How fair do you think this sentence is?

<i>Too lenient</i>		<i>Just right</i>			<i>Too harsh</i>	
-3	-2	-1	0	1	2	3

How satisfied do you feel with this sentence?

<i>Very unsatisfied</i>					<i>Very satisfied</i>	
1	2	3	4	5	6	7

How morally good or bad is this offender?

<i>Very bad</i>			<i>Average</i>				<i>Very good</i>			
-5	-4	-3	-2	-1	0	1	2	3	4	5

ML was sacked from his job at a garage. That night he went back to the garage, let himself in with a spare key, and stole a mechanic's toolkit. He was convicted of burglary. He is now participating in a drug/alcohol rehabilitation programme.

ML received a community order consisting of 80 hours of unpaid work.

How fair do you think this sentence is?

Too lenient *Just right* *Too harsh*

-3 -2 -1 0 1 2 3

How satisfied do you feel with this sentence?

Very unsatisfied *Very satisfied*

1 2 3 4 5 6 7

How morally good or bad is this offender?

Very bad *Average* *Very good*

-5 -4 -3 -2 -1 0 1 2 3 4 5

RT broke into a building site portacabin by cutting its padlock. He stole various items including a digital radio and a smartphone. RT was convicted of burglary. He has volunteered for many years at a local homeless shelter.

RT received 12 weeks' imprisonment.

How fair do you think this sentence is?

Too lenient *Just right* *Too harsh*

-3 -2 -1 0 1 2 3

How satisfied do you feel with this sentence?

Very unsatisfied *Very satisfied*

1 2 3 4 5 6 7

How morally good or bad is this offender?

Very bad *Average* *Very good*

-5 -4 -3 -2 -1 0 1 2 3 4 5

JS gained entry to a cycle shop by smashing a glass panel in the rear door. He stole a mountain bike and a set of bike lights. JS was later convicted of burglary.

JS was fined 1½ times his weekly income.

How fair do you think this sentence is?

<i>Too lenient</i>		<i>Just right</i>			<i>Too harsh</i>	
-3	-2	-1	0	1	2	3

How satisfied do you feel with this sentence?

<i>Very unsatisfied</i>				<i>Very satisfied</i>		
1	2	3	4	5	6	7

How morally good or bad is this offender?

<i>Very bad</i>			<i>Average</i>				<i>Very good</i>			
-5	-4	-3	-2	-1	0	1	2	3	4	5

Finally, please answer these additional questions about yourself.

1. Please match each of the four actions A – D below with the category that describes it best:

A – Volunteering for many years at a homeless shelter

☐

Taking responsibility for your actions

B – Writing a letter of apology to the victim

☐

Assisting the prosecution

C – Participating in a drug/alcohol rehabilitation programme

☐

Unrelated kindness

D – Giving evidence to the police about other offenders

☐

Showing remorse

2. How much influence do you think each of the factors listed below should have on a criminal sentence?

Taking responsibility for your actions

No influence

1 2 3 4 5

A major influence

6 7

Showing remorse

No influence

1 2 3 4 5

A major influence

6 7

Unrelated kindness

No influence

1 2 3 4 5

A major influence

6 7

Assisting the prosecution

No influence

1 2 3 4 5

A major influence

6 7

3. How harsh or lenient do you think each of these sentence types is?

Community sentence

Very lenient

1 2 3 4 5

Very harsh

6 7

Imprisonment

Very lenient
1 2 3 4 5 6 7
Very harsh

Fine

Very lenient
1 2 3 4 5 6 7
Very harsh

4. Please rank the sentences from 1 to 3 in order of harshness (with 1 being the harshest).

Community order (80 hours' unpaid work)

12 weeks' imprisonment

Fine of 1½ times your weekly income

5. Please read the six statements below carefully and decide to what extent you personally agree or disagree with it. Circle the number which corresponds to this judgement. Make sure you circle a number for every statement.

	Strongly agree	Agree	Slightly agree	Slightly disagree	Disagree	Strongly disagree
I think basically the world is a just place.	6	5	4	3	2	1
I believe that, by and large, people get what they deserve.	6	5	4	3	2	1
I am confident that justice always prevails over injustice.	6	5	4	3	2	1
I am convinced that in the long run people will be compensated for injustices.	6	5	4	3	2	1
I firmly believe that injustices in all areas of life (e.g., professional, family, politics) are the exception rather than the rule.	6	5	4	3	2	1
I think people try to be fair when making important decisions.	6	5	4	3	2	1

6. What is your gender? ☐ Male ☐ Female

7. How old are you? _____ years

8. How do you describe yourself?

- ☐ White
- ☐ Black
- ☐ Asian
- ☐ Chinese
- ☐ Mixed
- ☐ Other

9. What is your political preference?

- ☐ Labour
- ☐ Conservative
- ☐ Liberal Democrat
- ☐ Other (please specify)

10. Do you have any experience of the criminal justice system?

- ☐ No
- ☐ Victim or witness
- ☐ Offender
- ☐ Lawyer
- ☐ Police officer
- ☐ Other (please specify)

Thank you very much for taking the time to participate in this study.

Appendix 10

Study 4: Output of Orthogonal Design Function from IBM SPSS Statistics (Version 21)

Card List

	Card ID	Good character	Remorse	Addressing addiction	Previous convictions	Offence committed at night	Under the influence
1	1	present	absent	absent	present	absent	present
2	2	present	present	absent	absent	absent	absent
3	3	present	absent	absent	absent	absent	present
4	4	present	present	present	present	present	present
5	5	present	present	absent	present	absent	absent
6	6	present	absent	present	absent	absent	absent
7	7	present	absent	present	present	present	absent
8	8	absent	present	present	absent	present	absent
9	9	present	absent	present	absent	present	absent
10	10	absent	present	present	absent	absent	absent
11	11	absent	present	absent	present	present	present
12	12	present	present	absent	present	present	absent
13	13	absent	present	absent	present	absent	present
14	14	absent	present	absent	absent	present	present
15	15	absent	present	present	present	absent	absent
16	16	absent	present	absent	absent	absent	present
17	17	present	present	present	absent	absent	present
18	18	absent	absent	absent	present	absent	absent
19	19	absent	absent	present	present	present	present
20	20	present	absent	absent	absent	present	present

21	21	absent	absent	absent	present	present	absent
22	22	present	present	absent	absent	present	absent
23	23	absent	absent	present	absent	present	present
24	24	absent	absent	present	present	absent	present
25	25	absent	absent	absent	absent	absent	absent
26	26	absent	present	present	present	present	absent
27	27	absent	absent	present	absent	absent	present
28	28	present	absent	absent	present	present	present
29	29	absent	absent	absent	absent	present	absent
30	30	present	present	present	absent	present	present
31	31	present	absent	present	present	absent	absent
32	32	present	present	present	present	absent	present
33 ^a	33	absent	present	absent	absent	present	absent
34 ^a	34	present	absent	present	absent	present	present
35 ^a	35	present	absent	absent	absent	present	absent
36 ^a	36	absent	absent	absent	absent	present	present
37 ^a	37	absent	present	present	present	present	present
38 ^a	38	present	absent	present	present	present	present
39 ^a	39	absent	present	absent	absent	absent	absent
40 ^a	40	absent	present	present	present	absent	present
41 ^a	41	present	absent	absent	present	present	absent
42 ^a	42	present	absent	present	present	absent	present

a. Holdout

Note: SPSS generated 10 holdout cases as well as the 32 cases used in the study. In the event, the holdout cases were not needed.

Appendix 11

Stimuli used in Study 4

Please read this summary of an assault case.

John, aged 27, bumped into his ex-wife's new boyfriend in a local pub and the two men argued. John became extremely angry and punched the victim repeatedly in the face, breaking his jaw and knocking out two teeth. The victim also suffered severe concussion and extensive bruising to the face. John was convicted of inflicting grievous bodily harm (GBH). The judge has ruled that a prison sentence is necessary in the circumstances.

1. How long a prison sentence should John receive?

Sentence: _____ years _____ months

You will now be shown a number of different scenarios, each containing some extra information about the case described above. Please read each scenario and decide in each case how long a prison sentence the offender should receive.

2. John has two previous convictions for assault and was on bail at the time of the offence. He wrote a sincere letter of apology to the victim and is now participating in a drug/alcohol rehabilitation programme.

Sentence: _____ years _____ months

3. John was drunk when he committed the offence, has two previous convictions for assault and was on bail at the time of the offence. He is now participating in a drug/alcohol rehabilitation programme.

Sentence: _____ years _____ months

4. John has two previous convictions for assault and was on bail at the time of the offence.

Sentence: _____ years _____ months

5. John was drunk when he committed the offence, has two previous convictions for assault and was on bail at the time of the offence. He has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

6. John was drunk when he committed the offence and has two previous convictions for assault. He wrote a sincere letter of apology to the victim.

Sentence: _____ years _____ months

7. John was drunk when he committed the offence and was also on bail at the time of the offence. He wrote a sincere letter of apology to the victim.

Sentence: _____ years _____ months

8. John was drunk when he committed the offence, has two previous convictions for assault and was on bail at the time of the offence. He wrote a sincere letter of apology to the victim, is now participating in a drug/alcohol rehabilitation programme, and has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

9. John was drunk when he committed the offence. He wrote a sincere letter of apology to the victim, is now participating in a drug/alcohol rehabilitation programme, and has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

10. John was drunk when he committed the offence and has two previous convictions for assault. He is now participating in a drug/alcohol rehabilitation programme.

Sentence: _____ years _____ months

11. John has two previous convictions for assault. He wrote a sincere letter of apology to the victim and has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

12. John was drunk when he committed the offence and has two previous convictions for assault. He wrote a sincere letter of apology to the victim, is now participating in a drug/alcohol rehabilitation programme, and has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

13. John was on bail at the time of the offence. He wrote a sincere letter of apology to the victim and is now participating in a drug/alcohol rehabilitation programme.

Sentence: _____ years _____ months

14. John was on bail at the time of the offence. He wrote a sincere letter of apology to the victim and has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

15. John was drunk when he committed the offence and has two previous convictions for assault. He has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

16. John was drunk when he committed the offence and was also on bail at the time of the offence. He is now participating in a drug/alcohol rehabilitation programme.

Sentence: _____ years _____ months

17. John was drunk when he committed the offence. He has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

18. John was drunk when he committed the offence. He wrote a sincere letter of apology to the victim.

Sentence: _____ years _____ months

19. John was on bail at the time of the offence.

Sentence: _____ years _____ months

20. John was drunk when he committed the offence. He is now participating in a drug/alcohol rehabilitation programme.

Sentence: _____ years _____ months

21. John has two previous convictions for assault. He is now participating in a drug/alcohol rehabilitation programme and has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

22. John is now participating in a drug/alcohol rehabilitation programme and has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

23. John was drunk when he committed the offence, has two previous convictions for assault, and was on bail at the time of the offence. He wrote a sincere letter of apology to the victim.

Sentence: _____ years _____ months

24. John has two previous convictions for assault and was on bail at the time of the offence. He wrote a sincere letter of apology to the victim and has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

25. John was drunk when he committed the offence and was also on bail at the time of the offence. He wrote a sincere letter of apology to the victim, is now participating in a drug/alcohol rehabilitation programme, and has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

26. John is now participating in a drug/alcohol rehabilitation programme and has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

27. John has two previous convictions for assault.

Sentence: _____ years _____ months

28. John was drunk when he committed the offence and was also on bail at the time of the offence. He is now participating in a drug/alcohol rehabilitation programme and has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

29. John wrote a sincere letter of apology to the victim and is now participating in a drug/alcohol rehabilitation programme.

Sentence: _____ years _____ months

30. John has two previous convictions for assault. He wrote a sincere letter of apology to the victim and is now participating in a drug/alcohol rehabilitation programme.

Sentence: _____ years _____ months

31. John wrote a sincere letter of apology to the victim and has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

32. John was drunk when he committed the offence and was also on bail at the time of the offence. He has volunteered for many years at a local homeless shelter.

Sentence: _____ years _____ months

Finally, please answer a few additional questions.

1. Please match each of the six actions below with the category that describes it best, by writing A-F in the appropriate boxes:

A – Volunteering for many years at a homeless shelter	<input type="text"/>	Dealing with drug/alcohol problems
B – Writing a letter of apology to the victim	<input type="text"/>	Previous convictions
C – Participating in a drug/alcohol rehabilitation programme	<input type="text"/>	Unrelated good deeds
D – Having two previous convictions for assault	<input type="text"/>	Being under the influence of drugs/alcohol
E – Being on bail at the time of an offence	<input type="text"/>	Showing remorse
F – Being drunk when committing an offence	<input type="text"/>	Being on bail

2. What effect (if any) do you think each of the factors listed below should have on a criminal sentence?

Dealing with drug/alcohol problems

Should significantly reduce the sentence		Should not affect the sentence			Should significantly increase the sentence	
-3	-2	-1	0	1	2	3

Being on bail

Should significantly reduce the sentence		Should not affect the sentence			Should significantly increase the sentence	
-3	-2	-1	0	1	2	3

Showing remorse

Should significantly reduce the sentence		Should not affect the sentence			Should significantly increase the sentence	
-3	-2	-1	0	1	2	3

Unrelated good deeds

Should significantly reduce the sentence		Should not affect the sentence			Should significantly increase the sentence	
-3	-2	-1	0	1	2	3

Previous convictions

Should significantly reduce the sentence		Should not affect the sentence			Should significantly increase the sentence	
-3	-2	-1	0	1	2	3

Being under the influence of drugs/alcohol

Should significantly reduce the sentence		Should not affect the sentence			Should significantly increase the sentence	
-3	-2	-1	0	1	2	3

3. What is your gender? ☐ Male ☐ Female

4. How old are you? _____ years

5. How do you describe yourself? ☐ White
☐ Black
☐ Asian
☐ Chinese
☐ Mixed
☐ Other

6. Which of the following categories best describes your annual ☐ Less than £10,000
☐ £10,000-£14,999

- household income before taxes?
- ☐ £15,000-£19,999
 - ☐ £20,000-£24,999
 - ☐ £30,000-£39,999
 - ☐ £40,000-£49,999
 - ☐ £50,000-£74,999
 - ☐ £75,000-£99,999
 - ☐ £100,000-£149,999
 - ☐ £150,000+
 - ☐ Decline to answer

7. What is the highest educational or professional qualification you have obtained?
- ☐ GCSE/O-Level/CSE
 - ☐ Vocational qualifications (NVQ1/NVQ2)
 - ☐ A-Level/Scottish Higher or equivalent (NVQ3)
 - ☐ Bachelor's degree or equivalent (NVQ4)
 - ☐ Masters/PhD
 - ☐ No formal education

8. What is your political preference?
- ☐ Labour
 - ☐ Conservative
 - ☐ Liberal Democrat
 - ☐ Other (please specify)
-

9. Do you have any experience of the criminal justice system?
- ☐ No
 - ☐ Victim
 - ☐ Witness
 - ☐ Offender
 - ☐ Lawyer

- ☐ Police officer
 - ☐ Other (please specify)
-

Thank you very much for taking the time to participate in this study.

Appendix 12

Study 4: Individual Multiple Linear Regression Models

Participant No.	<i>b</i> -weights for each sentencing factor (unstandardised coefficients)						R^2 (adjusted R^2)	ANOVA F value
	Under Influence (95% CI – lower, upper)	Previous Convictions (95% CI – lower, upper)	On bail (95% CI – lower, upper)	Remorse (95% CI – lower, upper)	Alcohol/ drug (95% CI – lower, upper)	Good character (95% CI – lower, upper)		
1	0.063 (-6.057, 6.182)	-1.563 (-7.682, 4.557)	-1.563 (-7.682, 4.557)	4.313 (-1.907, 10.432)	-0.188 (-6.307, 5.932)	1.813 (-4.307, 7.932)	.108 (-.106)	0.506
2	N/A – same answer given for all 32 cases							
3	N/A – same answer given for all 32 cases							
4	3.375 (-0.386, 7.136)	4.125* (0.364, 7.886)	7.125** (3.364, 10.886)	-3.375 (-7.136, .386)	-4.125* (-7.886, -.364)	1.125 (-2.636, 4.886)	.566 (.462)	5.438**
5	0.000 (-1.692, 1.692)	3.000** (1.308, 4.692)	9.000*** (7.308, 10.692)	0.000 (-1.692, 1.692)	-0.750 (-2.442, 0.942)	-0.750 (-2.442, 0.942)	.844 (.806)	22.500***
6	0.000 (-1.070, 1.070)	-0.750 (-1.820, 0.320)	6.000*** (4.930, 7.070)	-0.750 (-1.820, 0.320)	0.000 (-1.070, 1.070)	-0.750 (-1.820, 0.320)	.848 (.812)	23.264***
7	-0.063 (-1.763, 1.638)	0.938 (-0.763, 2.638)	0.188 (-1.513, 1.888)	-3.563*** (-5.263, -1.862)	-3.438*** (-5.138, -1.737)	-0.438 (-2.138, 1.263)	.601 (.505)	6.266***
8	-0.813 (-2.604, 0.979)	3.688*** (1.896, 5.479)	2.563** (0.771, 4.354)	-3.813*** (-5.604, -2.021)	-1.563 (-3.354, 0.229)	-0.813 (-2.604, 0.979)	.670 (.591)	8.474***

9	-0.750 (-1.727, 0.227)	0.000 (-0.977, 0.977)	0.750 (-0.227, 1.727)	-0.750 (-1.727, 0.227)	-0.750 (-1.727, 0.227)	-0.750 (-1.727, 0.227)	.333 (.173)	2.083
10	-0.750 (-4.508, 3.008)	3.750* (-0.008, 7.508)	1.500 (-2.258, 5.258)	-2.250 (-6.008, 1.508)	-3.000 (-6.758, 0.758)	-1.500 (-5.258, 2.258)	.285 (.113)	1.661
11	2.063** (0.864, 3.261)	6.063*** (4.864, 7.261)	3.063*** (1.864, 4.261)	-1.688** (-2.886, -0.489)	-2.813*** (-4.011, -1.614)	-1.313* (-2.511, -0.114)	.881 (.853)	30.917***
12	-1.500 (-4.263, 1.263)	2.250 (-0.513, 5.013)	3.000* (0.237, 5.763)	-3.750* (-6.513, -0.987)	-3.000* (-5.763, -0.237)	-3.750* (-6.513, -0.987)	.543 (.433)	4.948**
13	4.125** (1.919, 6.331)	5.250*** (3.044, 7.456)	0.750 (-1.456, 2.956)	-2.625* (-4.831, -0.419)	-4.875*** (-7.081, -2.669)	-1.875 (-4.081, 0.331)	.724 (.671)	11.520***
14	-3.250 (-8.386, 1.886)	5.625* (0.489, 10.761)	4.875 ⁺ (-0.261, 10.011)	-2.000 (-7.136, 3.136)	-4.125 (-9.261, 1.011)	-4.125 (-9.261, 1.011)	.401 (.257)	2.787*
15	0.063 (-2.758, 2.883)	3.063* (0.242, 5.883)	0.688 (-2.133, 3.508)	-2.188 (-5.008, 0.633)	-5.933*** (-8.758, -3.117)	-0.688 (-3.508, 2.133)	.518 (.402)	4.477**
16	1.313* (0.134, 2.491)	2.438*** (1.259, 3.616)	0.188 (-0.991, 1.366)	-1.688** (-2.866, -0.509)	-1.688** (-2.866, -0.509)	-1.688** (-2.866, -0.509)	.665 (.584)	8.262***
17	2.313 (-1.694, 6.319)	8.313*** (4.306, 12.319)	2.688 (-1.319, 6.694)	-2.063 (-6.069, 1.944)	-3.813 ⁺ (-7.819, 0.194)	-0.938 (-4.944, 3.069)	.517 (.401)	4.462**
18	2.750 (-1.604, 7.104)	6.875** (2.521, 11.229)	2.500 (-1.854, 6.854)	1.000 (-3.354, 5.354)	-8.000** (-12.354, -3.646)	-7.750** (-12.104, -3.396)	.625 (.535)	6.942***

19	1.438 (-1.222, 4.097)	4.813** (2.153, 7.472)	7.438*** (4.778, 10.097)	-2.313 (-4.972, .347)	-3.688** (-6.347, -1.028)	0.313 (-2.247, 2.972)	.705 (.634)	9.953***
20	-0.750 (-2.295, 0.795)	-0.750 (-2.295, 0.795)	-0.750 (-2.295, 0.795)	-0.750 (-2.295, 0.795)	-0.750 (-2.295, 0.795)	-0.750 (-2.295, 0.795)	.194 (.000)	1.000
21	1.813 (-1.383, 5.008)	0.438 (-2.758, 3.633)	3.438* (0.242, 6.633)	-3.063 ⁺ (-6.258, 0.133)	-1.063 (-4.258, 2.133)	-1.938 (-5.133, 1.258)	.329 (.168)	2.046
22	1.125 (-2.139, 4.569)	4.875** (1.431, 8.319)	12.375*** (8.931, 15.819)	-2.625 (-6.069, 0.819)	-3.375 ⁺ (-6.819, 0.069)	-4.125* (-7.569, -0.681)	.753 (.694)	12.726***
23	-0.563 (-2.435, 1.310)	0.813 (-1.060, 2.685)	-0.563 (-2.435, 1.310)	-0.938 (-2.810, 0.935)	-4.313*** (-6.185, -2.440)	0.563 (-1.310, 2.435)	.505 (.386)	4.253**
24	0.125 (-2.385, 2.635)	5.750*** (3.240, 8.260)	3.875** (1.365, 6.385)	-4.375** (-6.885, -1.865)	0.250 (-2.260, 2.760)	-1.250 (-3.760, 1.260)	.650 (.566)	7.725***
25	3.750 (-1.054, 8.554)	15.875*** (11.071, 20.679)	9.000** (4.196, 13.804)	-5.875* (-10.679, -1.071)	-2.125 (-6.929, 2.679)	-0.250 (-5.054, 4.554)	.740 (.677)	11.830***
26	-1.313 (-5.206, 2.581)	6.563** (2.669, 10.456)	6.188** (2.294, 10.081)	1.188 (-2.706, 5.081)	0.688 (-3.206, 4.581)	-0.563 (-4.456, 3.331)	.488 (.366)	3.977**
27	-3.750 ⁺ (-7.670, 0.170)	3.750 ⁺ (-0.170, 7.670)	0.750 (-3.170, 4.670)	-3.750 ⁺ (-7.670, 0.170)	-8.250*** (-12.170, -4.330)	-2.250 (-6.170, 1.670)	.561 (.456)	5.331**
28	-0.375 (-2.171, 1.421)	8.125*** (6.329, 9.921)	5.125*** (3.329, 6.921)	-2.625** (-4.421, -0.829)	-2.875** (-4.671, -1.079)	-0.625 (-2.421, 1.171)	.850 (.814)	23.658***

29 N/A – same answer given for all 32 cases

30	-0.938 (-2.176, 0.301)	1.313* (0.074, 2.551)	0.563 (-0.676, 1.801)	-1.688* (-2.926, -0.449)	-0.563 (-1.801, 0.676)	-1.313* (-2.551, -0.074)	.463 (.335)	3.599*
31	0.500 (-1.975, 2.975)	6.125*** (3.650, 8.600)	1.875 (-0.600, 4.350)	-0.625 (-3.100, 1.850)	-1.875 (-4.350, 0.600)	-0.250 (-2.725, 2.225)	.556 (.450)	5.221**
32	1.813 (-5.603, 9.228)	21.938*** (22.522, 29.353)	29.938*** (22.522, 37.353)	-5.688 (-13.103, 1.728)	-3.063 (-10.478, 4.353)	-4.563 (-11.978, 2.853)	.817 (.773)	18.558***
33	-1.563 (-3.519, 0.394)	13.438*** (11.481, 15.394)	6.313*** (4.356, 8.269)	-2.563* (-4.356, 8.269)	-3.188** (-5.144, -1.231)	-2.188* (-4.144, -0.231)	.915 (.895)	45.120***
34	-0.188 (-0.574, 0.199)	2.813*** (2.426, 3.199)	-0.188 (-0.574, 0.199)	-2.813*** (-3.199, -2.426)	-0.188 (-0.574, 0.199)	0.188 (-0.199, 0.574)	.948 (.935)	75.667***
35	-1.563 (-4.399, 1.274)	17.063*** (14.226, 19.889)	4.938** (2.101, 7.774)	-0.063 (-2.899, 2.774)	-1.563 (-4.399, 1.274)	-3.063 (-5.899, -0.226)	.874 (.844)	28.982***
36	-0.188 (-0.959, 0.584)	0.688 (-0.084, 1.459)	0.938* (0.166, 1.709)	-0.813* (-1.584, -0.041)	-1.688*** (-2.459, -0.916)	-0.313 (-1.084, 0.459)	.588 (.489)	5.936**
37	-0.875 (-3.125, 1.375)	3.750** (1.500, 6.000)	0.625 (-1.625, 2.875)	-1.000 (-3.250, 1.250)	-1.250 (-3.500, 1.000)	-3.375** (-5.625, -1.125)	.494 (.373)	4.075**
38	-1.313 (-3.578, 0.953)	-0.813 (-3.078, 1.453)	-1.063 (-3.328, 1.203)	-3.563** (-5.828, -1.297)	-4.938*** (-7.203, -2.672)	-2.188 ⁺ (-4.453, 0.078)	.600 (.504)	6.248***

39	-0.375 (-1.147, 0.397)	-0.375 (-1.147, 0.397)	-0.375 (-1.147, 0.397)	-0.375 (-1.147, 0.397)	-0.375 (-1.147, 0.397)	-.0375 (-1.147, 0.397)	.194 (.000)	1.000
40	2.625 (-0.752, 6.002)	3.000 (-0.377, 6.377)	4.500* (1.123, 7.877)	-1.500 (-4.877, 1.877)	-1.875 (-5.252, 1.502)	0.750 (-2.627, 4.127)	.387 (.240)	2.632*

Note: *** $p < .001$, ** $p < .01$, * $p < .05$, + $p =$ between .05 and .07

Appendix 13

Study 4: Interaction Terms in Individual Multiple Linear Regression Models

Combinations of variables are indicated by the formulation “Variable 1*Variable 2”. A statistically significant interaction is indicated with “Y”, while a non-significant interaction is marked “N”. Positive interactions are highlighted in green, and negative interactions are highlighted in red.

Participant number	Remorse* Addressing addiction	Remorse* Good character	Addressing addiction* Good character	Remorse* Under the influence	Remorse* Previous convictions	Remorse* On bail	Addressing Addiction* Under the influence	Addressing Addiction* Previous convictions	Addressing Addiction* On bail	Good character* Under the influence	Good character* Previous convictions	Good character* On bail	Row mean Y
4	N	N	N	N	N	N	N	Y	N	N	N	N	1
5	N	N	N	N	N	N	N	N	N	N	N	N	0
6	N	N	N	N	N	N	N	N	N	N	N	N	0
7	Y	N	N	N	N	N	N	N	N	Y	N	N	2
8	N	N	N	N	N	N	N	N	N	N	N	N	0
11	N	N	N	N	N	N	N	N	N	N	N	N	0
12	N	N	Y	N	N	N	N	N	N	N	N	N	1
13	N	N	N	N	N	N	N	Y	N	N	N	N	1
14	N	N	N	N	N	N	N	N	N	N	N	Y	1
15	N	Y	Y	Y (under -)	N	N	Y (under -)	N	N	N	N	N	4
16	N	N	N	N	N	N	N	N	N	N	N	N	0
17	N	N	N	N	N	N	N	N	N	N	N	N	0
18	N	N	N	N	N	N	N	N	N	N	N	N	0
19	N	N	N	N	N	N	N	N	N	N	N	N	0
22	N	N	N	N	N	N	N	N	N	N	N	N	0
23	N	N	N	N	N	N	N	N	N	N	N	N	0
24	N	N	N	N	N	N	N	N	N	N	N	N	0
25	Y	N	N	N	N	N	N	N	N	Y	N	N	2
26	N	N	N	N	N	Y	N	N	N	N	N	N	1
27	N	N	N	N	N	N	N	N	N	N	Y	N	1
28	N	N	N	Y (under -)	N	N	N	N	N	N	N	N	1
30	Y	N	N	N	N	N	N	N	N	Y	N	N	2
31	N	N	N	N	N	N	N	N	N	N	N	N	0
32	N	N	N	N	N	N	N	N	N	N	N	N	0
33	N	N	N	N	N	N	N	N	N	N	N	N	0

34	N	N	N	N	N	N	N	N	N	N	N	N	0
35	N	N	N	N	N	N	N	N	N	N	N	N	0
36	N	N	N	N	N	N	N	N	N	N	N	N	0
37	N	Y	N	N	N	N	Y (under -)	Y	N	N	N	N	3
38	Y	N	Y	Y (under +)	N	N	N	N	N	Y	N	N	4
40	N	N	N	N	N	N	N	N	N	N	N	N	0
Column mean Y	4	2	3	3	0	1	2	3	0	4	1	1	0

Appendix 14

List of Ian K. Belton's Related/Relevant Publications and Presentations

Book chapter

Dhami, M.K., & Belton, I.K. (2015). Using court records for sentencing research: Pitfalls and possibilities. In J. Roberts (Ed.), *Exploring sentencing practice in England and Wales* (pp. 18-35). Basingstoke, England: Palgrave Macmillan.

Journal articles

Dhami, M. K., & Belton, I. K. (2017). On getting inside the judge's mind. *Translational Issues in Psychological Science*, 3(2), 214-226. DOI: 10.1037/tps0000115

Dhami, M.K., & Belton, I.K. (2016). Statistical analyses of court decisions: The example of multilevel models of sentencing. *Law and Method*, October 2016. DOI: 10.5553/REM/.000019

Dhami, M.K., Belton, I.K., & Goodman-Delahunty, J. (2015). Quasirational models of sentencing. *Journal of Applied Research in Memory and Cognition*, 4(3), 239-247. DOI: 10.1016/j.jarmac.2014.07.009

Belton, I.K., Thomson, M., & Dhami, M.K. (2014). Lawyer and non-lawyer susceptibility to framing effects in out-of-court civil litigation settlement. *Journal of Empirical Legal Studies*, 11(3), 578-600. DOI: 10.1111/jels.12050

Conference presentations

Belton, I.K., & Dhami, M.K. (Aug 2017). *Public judgments about the effect of personal mitigating factors on criminal sentencing*. Paper presented at the 26th Subjective Probability, Utility, and Decision Making Conference, Haifa, Israel.

Belton, I.K., & Dhami, M.K. (Sept 2016). *Public judgments regarding the effect of personal mitigating factors on criminal sentencing*. Paper presented at the 16th Annual Conference of the European Society of Criminology, Münster, Germany.

Belton, I.K., & Dhami, M.K. (Jul 2016). *The role of personal mitigating factors in Crown Court sentencing*. Poster presented at the British Society of Criminology 2016 Conference, Nottingham, England.

Belton, I.K., & Dhami, M.K. (Sept 2015). *The influence of personal mitigating factors on criminal sentencing decisions*. Paper presented at the 25th Subjective Probability, Utility, and Decision Making Conference, Budapest, Hungary.

Belton, I.K., & Dhimi, M.K. (Aug 2015). *The effect of personal mitigating factors on judgments of sentencing fairness*. Poster presented at the International Conference on Psychology & Law, Nuremburg, Germany.

Belton, I.K. (Jun 2015). *The influence of personal mitigating factors on criminal sentencing decisions*. Paper presented at the Middlesex University Research Student Conference, London, UK.

Manuscripts in Preparation

Dhimi, M.K., Merrall, E., Belton, I.K., McGrath, A., & Bird, S. *Sentencing in cognitively simple doses: Evidence for a heuristic approach to criminal punishment*.

Belton, I.K., & Dhimi, M. K. *Review of sentencing using multilevel models*.